90-354(1)

Supreme Court,
FILE
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No. 90- _____

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1990

SARAH ELIZABETH FREY and
PEOPLE AGAINST THE INCINERATOR (PATI),
An Unincorporated Association
Petitioners,

v.

WILLIAM K. REILLY, Administrator,
United States Environmental Protection Agency
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Date: August 28, 1990

QUESTIONS PRESENTED

1. Did Congress intend that 42 U.S.C. § 9613(h) be interpreted and applied to preclude only pre-enforcement review, and not post-enforcement and post-consent decree review of citizen claims that EPA acted ultra vires and in violation of its Superfund and NEPA statutory mandates in selecting a remedial response for a National Priorities List hazardous waste site without conducting feasibility and environmental impact studies of alternatives and providing for public review and comment?

2. If 42 U.S.C. § 9613(h) on its face precluded post-enforcement pre-implementation review, would the federal courts nonetheless have jurisdiction, under the "statutory authority" exception, to review a blatantly lawless EPA Superfund remedial decision process?

3. Does the District Court maintain post-enforcement pre-implementation jurisdiction over denial of due process claims despite the limiting language of 42 U.S.C. §9613(h) where withholding judicial review will result in irreparable harm to plaintiffs' health and environment and deny them an opportunity to seek review of EPA's failure to provide for notice and opportunity to be heard on EPA's proposed Superfund remedy decision and supporting analysis?

4. Does application of 42 U.S.C. § 9613(h) so as to provide an industrial toxic waste polluter post-enforcement review of EPA's decision process and selected remedial action before remedy implementation while denying this same access to the courts to citizen plaintiffs constitute a violation of the constitutional guarantee of equal protection of the laws, thereby voiding any jurisdictional limitation on post-enforcement review by citizens?

PARTIES TO THE PROCEEDING

1. Petitioners:
Sarah Elizabeth Frey,
People Against the Incinerator (PATI)*
an unincorporated association

2. Respondent:
William K. Reilly, in his capacity as Administrator of the U.S. Environmental Protection Agency

* As required by Rule 28.1 of this Court, Petitioner PATI states that it has no parent companies, subsidiaries, or affiliates.

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Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Sarah E. Frey and People Against the Incinerator (PATI), petition this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 24,1990 and May 30 and 31, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, upholding the decision to dismiss for want of jurisdiction by the United States District Court for the Southern District of Indiana (Case No. IP-88-948-C) is reported at 900 F.2d 1091 (7th Cir. 1990). The decision of the Court of Appeals is printed in the Appendix hereto, infra, page 3a. The opinion of the District Court is reported at 28 E.R.C.1655 (S.D. Ind.). The decision of the District Court is printed in the Appendix hereto, infra, page 18a.

JURISDICTION

The judgment of the Court of Appeals (Appendix, infra, page 3a) was entered on April 24, 1990. A timely petition for rehearing was denied on May 30, 1990 with an Amended Order issued on May 31, 1990. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. V. No person . . . shall be deprived of life, liberty, or property without due process of law.

National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C § 4332(2)(C).

(2) all agencies of the Federal Government shall--

(C) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-

term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, ("CERCLA" or "Superfund") as amended by the Superfund Amendments and Reauthorization Act of 1986, ("SARA" Pub.L. No. 99-499, 100 Stat. 1613 et seq. (1986)) provisions:

42 U.S.C. § 9604(a)(1). (a) (1) Whenever any hazardous substance is released or there is a substantial threat of such a release into the environment ...the President is authorized to act, consistent with the national contingency plan, to remove ...and provide for remedial action ... or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

42 U.S.C § 9606(a). when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance..., he may require the Attorney General ...to secure such relief as may be necessary to abate such danger ... and the district court ...shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

42 U.S.C. §9613(h). No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(4) An action under section 9659 of

this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site. (Emphasis added.)

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

42 U.S.C. § 9613(k)(2)(B). Remedial action. The President shall provide for the participation of interested persons ... in the development of the administrative record on which the President will base the selection of the remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting ...

42 U.S.C. §9616(d). The President shall assure that remedial investigations and feasibility studies (RI/FS) are commenced for facilities listed on the National Priorities List, in addition to those commenced prior to the date of enactment of Superfund Amendments ... in accordance with the following schedule: ...

42 U.S.C. 9617. (a) Proposed plan. Before adoption of any plan for remedial action to be undertaken by ...or by any

other person, under section 104, 106, 120, or 122..., the President or State, as appropriate, shall take both of the following actions:

(1) Publish a notice and brief analysis of the proposed plan and make such plan available to the public.

(2) Provide a reasonable opportunity for submission of ...comments and an opportunity for a public meeting ... regarding the proposed plan ....

The notice and analysis published under paragraph (1) shall include sufficient information as may be necessary to provide a reasonable explanation of the proposed plan and alternative proposals considered.

42 U.S.C. § 9622(m). In the case of consent decrees and other settlements under this section (including covenants not to sue), no provision of this Act shall be construed to preclude or otherwise affect the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements.

42 U.S.C. § 9659. Except as provided in ...section 113(h) ... (relating to timing of judicial review), any person may commence a civil action on his own behalf--

> (1) against any person (including the United States and any other ... or agency ...) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this Act ...; or
>
> (2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency ... where there is alleged a failure of the President or such other officer to perform any act or duty under this Act ... which is not discretionary ....

40 C.F.R. 300.61(c) (1982). In determining the need for and

in planning or undertaking fund-financed action, response personnel should, to the extent practicable, consider the following:

* * *

(3) Be sensitive to local community concerns (in accordance with applicable guidance).

40 C.F.R. 300.67 (d) (1985). In remedial actions at NPL sites, including Fund-financed and enforcement actions, feasibility studies that outline alternative remedial measures must be provided to the public for review and comment for a period of not less than 21 calendar days. Such review and comment shall precede selection of the remedial response.

40 C.F.R. 300.68(f)-(j) (1982).

(f) A remedial investigation should be undertaken by the lead agency ...to determine the nature and extent of the problem presented by the release.

(g) A limited number of alternatives should be developed .... One alternative may be a no-action alternative ... for example, when response action may cause a greater environmental or health danger than no action.

(h) The alternatives developed ... will be subjected to an initial screening ....

(1) For each alternative, the cost of installing or implementing the remedial action must be considered, ...

(2) The effects of each alternative should be evaluated .... If an alternative has significant adverse effects, it should be excluded from further consideration. ....

(i)(1) A more detailed evaluation will be conducted ...

(2) The detailed analysis of each alternative should include: ...(D) An assessment of each alternative in terms of the extent to which it is expected to effectively mitigate and minimize damage to ... public health, welfare and the environment, ...(E) An analysis of any adverse environmental impacts ...

(j) The appropriate extent of remedy shall be

determined by ... selection of lowest cost alternative that is ... feasible and reliable and ... minimizes damage to ... public health ...

STATEMENT OF THE CASE

This case raises fundamental statutory and constitutional issues affecting the health, safety and environmental quality of millions of Americans and the expenditure of literally billions of dollars in hazardous waste response costs. It poses the question of whether and how Congress may limit the timing of judicial review of blatantly lawless agency action which is clearly harmful to public health and the environment. This case involves consideration of a 7th Circuit opinion which requires affected citizens and groups to stand aside and watch illegal agency action proceed for years causing serious harm to their families and community, and then, after the harm has been done and the issues of the U.S. Environmental Protection Agency's (EPA) violation of fundamental constitutional and statutory requirements have become moot, be allowed only to bring a symbolic judicial action with no hope of effective remedy.

A. Statutory Background

Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601 et seq., in 1980 to address the serious environmental and public health threats posed by abandoned hazardous waste sites created through years of reckless waste disposal by industry and government neglect. Congress amended the Superfund Statute in 1986 by passage of the Superfund Amendments and Reauthorization Act (SARA), Pub.L. No. 99-499, 100 Stat. 1613 et seq. (1986).[1]

The Congress, in the Superfund statute, and EPA, in

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[1] See 42 U.S.C. § 9601 et seq.

the regulations promulgated to enforce the Act, require specific safeguards and procedures to be followed in addressing contaminated sites.[2] The first step in this required procedure is for EPA to conduct a preliminary assessment/site investigation (PA/SI) after discovery of a site, and issue a PA/SI report. Once this assessment and investigation is complete, the site is evaluated on the basis of the PA/SI and ranked on a point scale under the Hazard Ranking System (HRS) to determine if the site scores high enough (if it poses such a serious threat) to qualify for placement on the National Priorities List (NPL), and thereby qualify for federal cleanup funds (from the Superfund).

If the site ranks high enough for placement on the NPL, a second set of procedural safeguards are required. These safeguards include the requirement that a remedial investigation/feasibility study (RI/FS) be conducted to define the nature of the contamination problem and assess the feasibility of alternative cleanup plans (remedies) and the environmental impacts of each. 42 U.S.C. § 9616(d); 40 C.F.R. 300.68 (1982 and 1985). This requirement is acknowledged by the 7th Circuit in its opinion. Frey v. Reilly, 900 F.2d 1091, 1093. If EPA fails to conduct an RI/FS or conducts an RI/FS that fails to adequately address the environmental impacts of the chosen remedy and all reasonable alternatives (fails to perform the functional equivalent of an EIS), then EPA must prepare a full Environmental Impact Statement. 42 U.S.C. § 4332(2)(C).

Once the RI/FS or EIS is drafted, public comment must be taken on the study and the alternatives described therein, prior to finalizing the RI/FS or EIS and prior to selecting a remedy. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1503.1 (1987); 40 C.F.R. § 300.61 (1982) (and incorporated guidance); 40 C.F.R. § 300.67 (1985); 42 U.S.C. § 9613(k); 42 U.S.C. § 9617. The 7th Circuit also acknowledged this requirement. Frey, 900 F.2d at 1093. The EPA selects a

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[2] See 42 U.S.C. § 9601 et seq. and 40 C.F.R. § 300 et seq.

remedy based on the RI/FS and public comment thereon and formalizes the decision in a Record of Decision (ROD) (or Enforcement Decision Document (EDD)). EPA then proceeds to implement that remedy either directly under 42 U.S.C. § 9604 using EPA funds or, after an enforcement order or suit under 42 U.S.C. § 9606, through oversight of actions of the party responsible for the pollution. If the remedy selection was part of an enforcement litigation settlement-as here, the ROD is incorporated into a federal court consent decree. 42 U.S.C. § 9622. The decree itself is subjected to (post-ROD pre-court approval) public review during another comment period pursuant to Department of Justice regulations at 28 C.F.R. § 50.7, not to be confused with the public comment and participation required under NEPA and Superfund which comes prior to selection of the remedy and involves comment on an analysis of feasibility and impacts of alternatives.

Both the studies done at the pre-remedial and remedial stages, as well as the site cleanup (remediation) itself are expensive. RI/FS studies can cost $500,000 or more. Site cleanups often cost millions of dollars, and sometimes hundreds of millions of dollars. More importantly, if the hazardous waste is handled improperly, serious harm can occur to the environment and public health. The timely and accurate assessment and reporting of such hazardous waste sites is thus a critical step which will determine both whether the responsible industry (or government) polluter will have to pay millions of dollars in cleanup costs and whether public health and environment will be harmed.

B. Facts

In January of 1983, eight years after EPA became aware of the Bloomington Polychlorinated Biphenyl (PCB) contamination problem, the EPA sued Westinghouse Electric Corporation ("Westinghouse") pursuant to 42 U.S.C. §§ 9604, 9606, and 9607, and 42 U.S.C. § 6973, seeking the cleanup of two (of several) toxic waste dumps near

Bloomington, Indiana.[3] The State of Indiana intervened, and Westinghouse joined the Monsanto Company as a third-party defendant. Later, the case was consolidated with an earlier tort suit filed by the City of Bloomington regarding two other toxic waste dump sites containing Westinghouse waste.[4]

In early 1984, the parties to the Westinghouse actions began protracted consolidated settlement negotiations which were conducted well out of public view. A proposed consent decree resulted from these secret negotiations which inter alia provided that the City of Bloomington and Monroe County would pay Westinghouse, the polluter, to burn local garbage as the primary fuel for a proposed Westinghouse designed and operated experimental incinerator to be used to "treat" the toxic PCB waste which Westinghouse had recklessly disposed of in the community. The tipping fee paid to Westinghouse together with fees from the sale of steam and electricity to be generated from the proposed incinerator, and the profit from sale of similar incinerators Westinghouse hoped to market, was intended by Westinghouse to offset their cleanup costs. The proposal covered only a few of the known contaminated sites leaving others, notably the Westinghouse plant property itself, unaddressed.

The first public meeting to take comment on the proposed decree which emerged from the secret negotiations was held December 5, 1984, one day after EPA had already signed a record of decision (ROD) called an enforcement decision document (EDD) selecting the remedy described. This meeting and the successive public meetings revealed wide-spread public opposition to and fear about the public health dangers apparent in the experimental and limited-scope cleanup plan.

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[3] See United States v. Westinghouse Electric Corp., No. IP 83-9-C (S.D. Ind. Jan. 4, 1983).

[4] See City of Bloomington, v. Westinghouse Electric Corp., No. IP 81-448-C (S.D. Ind. 1981).

The signing of the ROD/EDD document constituted EPA's final remedy selection decision, and the EPA filing of the Superfund enforcement suit under 42 U.S.C. § 9606 to compel Westinghouse to cleanup the sites in question categorizes all subsequent EPA and citizen action as "post-enforcement".

EPA selected the remedial plan (remedy) without complying with the requirements of the National Environmental Policy Act.[5] NEPA mandates preparation of a formal environmental impact statement ("EIS") before any Federal agency undertakes any "major Federal actions affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The ROD/EDD was signed without prior (or post) performance of a Remedial Investigation/Feasibility Study ("RI/FS"), an environmental assessment procedure required by EPA Superfund regulations at 40 C.F.R. §300.68 to be performed before remedial decisions can be made and implemented.

The eventual consent decree incorporating EPA's record(s) of decision provided for remedial action at (only) six (of a large number) of contaminated sites, four of which were Superfund National Priorities List sites. The EPA performed limited studies of two of these sites in 1983 that addressed remedial alternatives. However, these studies did not address the feasibility or environmental impacts of the remedy actually selected by EPA.

More specifically, these studies did not address the feasibility of the experimental plan to use garbage as fuel for an incinerator to be used to attempt to destroy toxic and hazardous waste in soil and sludge. The studies did not address the environmental impacts of such incineration in Monroe County (or anywhere). Nor did the studies address the full scope of known contamination from Westinghouse waste disposal nor the impacts of addressing only part of such contamination in the remedy selected. The other four sites,

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[5] NEPA, 42 U.S.C. §§ 4321 to 4370a.

each environmentally different and different in terms of the nature of the contamination problem, were not addressed in any study of feasibility, impacts, or alternatives.

No study, including the two inadequate ones that were done, were submitted for public review prior to EPA's final action of signing the record of decision on December 4, 1984. These studies would not have been available at all except for a freedom of information request by Indiana Public Interest Research Group (InPIRG). The ROD/EDD itself would never have been revealed to the public except for a second freedom of information request by InPIRG which finally, after some assistance from Indiana elected officials, forced disclosure two and a half years later in August, 1987.

Following a series of public meetings to take public comment on the proposed consent decree, in the absence of the administrative record including the ROD and any feasibility or impact studies of the selected remedy or alternatives, during which over ninety percent of citizens testifying explicitly condemned the proposal and decision process, EPA moved the federal court to approve the proposal. The District Court approved the proposal and issued the consent decree in August, 1985 without holding a hearing and without the benefit of the EPA ROD and any supporting analysis, while denying as untimely citizen intervention motions made in September, 1984.

C. PROCEEDINGS BELOW

After EPA made public disclosure of its ROD/EDD in August of 1987, and after Petitioners analyzed the disclosed materials, it became clear that no equivalent of an EIS was ever performed by EPA. Consequently, Petitioners on February 10, 1988 filed an action in the district court of the District of Columbia claiming the decision constituted an unlawful agency action in violation of NEPA due to failure to prepare an EIS and provide for meaningful public participation in the remedy selection process leading to the EDD (ROD); and failure to prepare an RI/FS as required by

Superfund prior to selection of a remedy. Petitioners asked for declaratory relief but no injunction. On July 25, 1988, the Court granted the government's motion to transfer the action to the Southern District of Indiana.

On December 6, 1988, the Court granted Defendant's motion to dismiss for lack of jurisdiction pursuant to CERCLA Section 113(h), 42 U.S.C. § 9613(h). Petitioners' appeal of the district court's dismissal was consolidated with that of David Schalk[6] and Ronald T. Smith.[7]

On April 24, 1990, the U.S. Court of Appeals for the Seventh Circuit upheld the District Court's dismissal. The Appellate Court's decision merely upheld the district court's interpretation of the preclusive affect of 42 U.S.C. § 9613(h)(4), and dismissed Plaintiff's and Amicus Curiae InPIRG's Fifth Amendment due process and equal protection concerns as ". . . novel theories [that] rest on undesirable expansions of the meaning of the Fifth Amendment" and failed to respond to them, discuss them, or to distinguish case law cited to support them. On May 30, 1990, the Court denied Petitioners' Petition for Rehearing with Suggestion for Rehearing In Banc, and issued an amended order to this effect on May 31, 1990.

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[6] Until 1984 David Schalk was the Bloomington City Chemist. Upon EPA's disclosure of the ROD/EDD, Schalk, like Petitioner, filed an equitable action against the decision in the D.C. district court in December, 1987. The suit was transferred to the Southern District of Indiana and dismissed for lack of jurisdiction pursuant to 42 U.S.C. § 9613(h)4. His appeal was consolidated with Petitioners'.

[7] Ronald T. Smith succeeded David Schalk as Bloomington City Chemist, and was a co-plaintiff in Schalk's suit.

REASONS FOR GRANTING THE WRIT

I. The 7th Circuit's Decision Denying Judicial Review of EPA's Failure to Comply with Provisions of CERCLA and NEPA that Require Written Analyses of Hazardous Site Cleanup Options and Meaningful Opportunities for Public Comment and Participation is Wrong, and is in Direct Conflict with the 2nd, 5th, and 11th Circuits

A. The 7th Circuit Fundamentally Misinterpreted the Plain Meaning of the Timing of review Provision in CERCLA § 9613(h)

The 7th Circuit opinion is obviously and fatally flawed because Judge Daniel A. Manion, writing for the 7th Circuit, failed to acknowledge the legal significance of the clear fact that EPA had already filed suit against Westinghouse to enforce the Superfund statute and compel a cleanup remedy, as evidenced by the 1985 consent decree of the district court. Judge Manion acknowledges the EPA enforcement suit and resulting consent decree in the 7th Circuit opinion. Frey v. Reilly, 900 F.2d at 1093. Thus there is no dispute that Plaintiffs are in the posture of bringing a post-enforcement review claim, not a pre-enforcement review action, although Judge Manion does not express this clearly in the 7th Circuit opinion.

It is clear, however, that 42 U.S.C. § 9613(h) limits only pre-enforcement review, not post-enforcement review. 42 U.S.C. § 9613(h) states:

> No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

* * *

> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site. (Emphasis added.)
>
> (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

The plain meaning of § 9613, when read in its entirety and in conjunction with the other referenced sections of CERCLA, makes clear that Petitioners' suit is not barred.

The introductory paragraph of the 42 U.S.C. § 9613(h) timing of review provision states exactly the types of EPA action for which review is precluded as a general rule, namely a 42 U.S.C. § 9604 EPA funded action (which is not the case here) and a 42 U.S.C. § 9606 administrative order (which is also not the case here). These categories of EPA actions represent situations known as pre-enforcement since EPA has not yet invoked the jurisdiction of the federal courts itself by filing a suit to inter alia compel a remedy, enforce an administrative order, or establish liability and seek reimbursement.

The opinions from other circuits and the legislative history discussed infra show beyond doubt that the 42 U.S.C. § 9613(h) language "or to review any order issued under section 9606(a) of this title" means agency orders issued by EPA, not court orders such as consent decrees. Therefore, an EPA enforcement suit under 42 U.S.C. § 9606 does not

fall within the scope of 42 U.S.C. § 9613(h). The opinions from other circuits and the legislative history show explicitly that only pre-enforcement review is limited. It is in holding that post-enforcement review is limited by 42 U.S.C. § 9613(h) that the 7th Circuit opinion conflicts directly with other circuits, meriting the attention of this Court and justifying the issuance of the Writ of Certiorari.

The error in the reasoning of the 7th Circuit which placed it at odds with the other circuits becomes clear upon a close reading. Following the introductory paragraph in § 9613(h) five items are listed which identify exceptions to the general rule. The 7th Circuit errs by addressing the exceptions to § 9613(h) as if they apply to post-enforcement cases. The court fails to recognize that EPA enforcement suits under 42 U.S.C.§ 9606, such as the one here, do not fall within the parameters of the introductory language of § 9613(h), and thus are not cases where review is limited at all. Consequently, there is no need to look at the list of exceptions.[8]

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[8] There are obvious reasons why review would not be limited where a § 9606 suit had been filed. Once the court had assumed jurisdiction of the EPA § 9606 enforcement complaint, it would necessarily have jurisdiction to hear defenses from the responsible party defendants, as well as any citizen plaintiffs with standing and a cause of action (such as a citizen enforcement suit), under general principles of law and the Federal Rules of Civil Procedure. The Superfund statute recognizes this explicitly in 42 U.S.C. § 9622(m) ("In the case of consent decrees and other settlements under this section (including covenants not to sue), no provision of this Act shall be construed to preclude or otherwise affect the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements"). Because Plaintiff Frey in the instant case brought a complaint alleging that the EPA decision process that resulted in an ROD, which was then incorporated into a consent decree following litigation under 42 U.S.C. § 9606, violated both NEPA and Superfund, her complaint is either a challenge to a decree as void due to illegality, a ground for relief from judgment under Fed.R.Civ.Proc. 60(b) which is therefore allowed under 42 U.S.C. § 9622(m), or her complaint is not a "challenge" at all and therefore

It is significant that the 7th Circuit opinion in quoting the statutory language of 42 U.S.C. § 9613(h) omits the key language which limits application of 42 U.S.C. § 9613(h) to only 42 U.S.C. § 9604 actions and 42 U.S.C. § 9606 (administrative) orders, and not 42 U.S.C. § 9606 suits. Frey, 900 F.2d at 1095. The failure of the 7th Circuit to consider the 42 U.S.C. § 9613(h) language in its entirety results in an out of context reading of portions of the provision which lead the 7th Circuit to the inevitable conclusion (under the circumstances of the misreading) that 42 U.S.C. § 9613(h) limits all challenges to remedial actions including post-enforcement challenges such as the case at bar. See, Frey, 900 F.2d at 1098 ("Federal courts lack subject matter jurisdiction to consider challenges to remedial actions that have not been 'taken' or 'secured.'"). The legislative history cited in the Court's opinion is in itself sufficient, however, to make clear the error in the 7th Circuit's reasoning, and that pre-enforcement review is all Congress intended to limit.

The 7th Circuit cites the Conference Committee Report, the Report from the House Committee on Energy and Commerce, and the Report from the House Judiciary Committee all for the proposition that federal courts lack jurisdiction over citizen suits where a remedial action has not been completed (regardless of the enforcement status of the case). Frey, 900 F.2d at 1096. However, each of these reports clearly shows that Congress intended to limit only pre-enforcement review. The 7th Circuit failed to note that the Conference Report section laying out the § 9613(h) timing of review provision was entitled "Pre-enforcement review". H.R. Rep. No. 962, 99th Cong., 2d Sess. 40 (1986). The 7th Circuit opinion quotes the word "completed" out of this pre-enforcement context and fails to note that the conference substitute provision (now 42 U.S.C. § 9613(h)) adopted the first three "exceptions" of the Senate and House Amendments

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jurisdiction of it is not removed by § 9613(h).

which allow for review of a response inter alia when EPA brings a suit for abatement under 42 U.S.C. § 9606(a), which is exactly the circumstance of the present case. H.R. Rep. No.962 at 221, 223.

Judge Manion also quotes the House Committee on Energy and Commerce Report to the effect that there is no right of judicial review until completion of a response action. However, the quote states that this is true for "the Administrator's selection and implementation of response actions" [emphasis added]. Frey, 900 F.2d at 1096. This makes clear that the Committee was speaking only of pre-enforcement situations since the entire goal of enforcement is to compel the responsible party to implement the response. If any doubt remained, the section in the Committee on Energy and Commerce Report from which Judge Manion quoted is, as with the previous cite, entitled "pre-enforcement." H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 81 (1986).

To dispose of doubt on the matter entirely, this same section states "Response actions or consent orders under section 104 [42 U.S.C. § 9604] and orders under section 106 [42 U.S.C. § 9606] may be subject to judicial review at the time the government seeks cost recovery or acts to enforce an order or otherwise obtain injunctive relief." Id. The 7th Circuit quoted the Committee clearly out of context in that the omitted part of the sentence from which the quote was taken read "The section is intended to codify the current position of the Administrator and Department of Justice with respect to pre-enforcement review: ..."[emphasis added].

Finally, the 7th Circuit cited the House Judiciary Report to the same effect that review of a response could not be had until it was completed. Frey, 900 F.2d at 1096. Suffice it to say that the relevant section of this report is also entitled "pre-enforcement review", that the report acknowledges review can be had when there is an action for an injunction under 42 U.S.C. § 9606 (as here), and states "that, in the absence of a government enforcement action, judicial review of the selection of a response action should

generally be postponed ...." H.R. Rep. No. 253(III), 99th Cong., 2d Sess. 21, 22 (1986).

B. As a Result of the 7th Circuit's Flawed Statutory Interpretation, Its Decision Directly Conflicts with Other Circuits

The 7th Circuit's decision below is therefore in direct conflict with the 2nd, 3rd, 5th and 11th Circuits (as well as with district court decisions in other circuits) which have clearly found that Congress intended 42 U.S.C. § 9613(h) to limit pre-enforcement, not post-enforcement, review. Browning Ferris Industries of South Jersey, Inc. v. Muszynski, 891 F.2d 161 (2nd Cir 1990); State of Alabama v. U.S. E.P.A., 871 F.2d 1548 (11th Cir. 1989), cert. denied, 110 S.Ct. 538 (1989); Combustion Equipment Assoc., Inc v. U.S.E.P.A., 838 F.2d 35 (2nd Cir. 1988); Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380 (5th Cir. 1989); Dickerson v.Administrator, E.P.A., 834 F.2d 974 (11th Cir. 1987).

The 7th Circuit cites to Alabama as its primary authority to support the erroneous conclusion that post-enforcement review is prohibited by 42 U.S.C. § 9613(h). Frey, 900 F.2d at 1095-1097. Therefore, the direct conflict between the 7th Circuit decision below and the 11th Circuit decision in Alabama is considered first. It should be made clear that Alabama considered several different types of claims and found jurisdiction was not available for some, but was for others. This distinction the 7th Circuit failed to make.

Alabama directly conflicts with the 7th Circuit opinion in several ways. The most blatant and most fundamentally important conflict is that in the Alabama opinion, contrary to the out-of-context discussion of this decision in the 7th Circuit opinion, the 11th Circuit held that it had jurisdiction to review plaintiffs claims that EPA had violated the Superfund statute and had illegally denied notice and rights to participate in the

development of the record of decision, just as Petitioners claim here. Alabama, 871 F.2d at 1559. "To the extent plaintiffs' complaint may in part be read as not challenging the remedial action plan and therefore not removed from federal jurisdiction by section 113(h), we address the merits of plaintiffs' claims ...." Id.

Further, the Alabama court stated "[t]o the extent plaintiffs challenge the EPA's cleanup under section 117(a) and (b), it is clear that EPA has complied ...." Id. "Consequently, we reverse ...." Id. Clearly, the 11th Circuit held that it had jurisdiction and gave plaintiffs a hearing on the merits of their claims that EPA violated the decision process required by Superfund, including the requirements for public participation. This is precisely opposite the holding of the 7th Circuit.

The Alabama court also considered plaintiffs' constitutional challenges to an EPA response action and rejected them on standing grounds (rather than lack of jurisdiction). Alabama, 871 F.2d at 1555-56. The Alabama court further considered plaintiffs' other statutory challenges on the basis of which plaintiffs had requested an injunction halting implementation of the remedial action and reopening of the record of decision. Alabama, 871 F.2d at 1557-59.

In finding that such challenges were precluded by 42 U.S.C. § 9613(h) the Alabama court emphasized two important points which place it in conflict with the 7th Circuit. First, citing to the legislative history, the Alabama court repeatedly acknowledged that 42 U.S.C. § 9613(h) limited "pre-enforcement review." Alabama, 871 F.2d at 1557-58; also see Dickerson v. Administrator, E.P.A., 834 F.2d 974 (11th Cir. 1987). The Alabama court found it lacked jurisdiction for plaintiffs' claims on which injunctions were requested to halt implementation of the remedy because on the facts of Alabama there had been no EPA enforcement action, unlike here. Alabama, 871 F.2d at 1559-60.

Further, in analyzing plaintiffs' arguments that they were not really "challenging" the response action but the

selection of an off-site remedial plan generally, the Alabama court emphasized that plaintiffs' argument failed because plaintiffs sought to enjoin implementation, unlike here where no injunction to halt implementation was sought. Alabama, 871 F.2d at 1558-59. The Alabama court's reasoning makes clear that judicial review of the decision process is not prohibited by 42 U.S.C. § 9613(h). Alabama, 871 F.2d at 1558-59.[9]

The 7th Circuit opinion is also in conflict with the 2nd Circuit. Browning Ferris Industries of South Jersey, Inc. v. Muszynski, 891 F.2d 161 (2nd Cir 1990). The 2nd Circuit in Browning Ferris, as the 11th Circuit in Alabama, found that § 9613(h) limits pre-enforcement review. Browning Ferris 891 F.2d at 154 ("While not dispositive, the express congressional prohibition on pre-enforcement judicial

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[9] The distinction between a challenge to a decision process and a challenge to the merits of a decision was addressed by this Court in Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986). In Bowen this Court held that despite statutory preclusion of federal jurisdiction for challenges to the merits of a particular agency decision, if the challenge is really to the illegality of the decision process itself, the courts retain jurisdiction. The 7th Circuit opinion wholly fails to make the distinction or fails to apply the rule. In either case, the 7th Circuit is in conflict with this Court's holding in Bowen. The 7th Circuit attempts to equate Petitioners' claims that EPA violated NEPA in failing to perform an EIS and take public comment prior to selecting a remedy with a claim that the particular remedy chosen is inadequate. By erroneously equating Petitioners' procedural NEPA claim with a claim that the remedy chosen is wrong, the 7th Circuit concludes that Frey is challenging the remedy and therefore § 9613(h) removes jurisdiction. This is pure folly. Petitioners have not altered their NEPA procedural claim nor have they amended their complaint to seek an injunction. They may not be thrilled with the experimental remedy selected. But seldom is an illegal decision process that improperly shuts out public participation one that produces a satisfying result. nonetheless, the process remains illegal, and nonetheless still a process. The procedural nature of a NEPA claim was made clear recently by this Court. See Robertson v. Methow Valley Citizens, 490 U.S. ___, 109 S.Ct. 1835 (1989).

review of CERCLA orders, 42 U.S.C. § 9613(h), suggests ...."). See also Combustion Equipment Assoc., Inc v. U.S.E.P.A., 838 F.2d 35 (2nd Cir. 1988) ("In fact Congress amended CERCLA in 1986 to make clear that the statute precluded preenforcement judicial review. See 42 U.S.C.A. § 9613(h)....").

The 5th Circuit has likewise acknowledged that the limitation on review expressed in 42 U.S.C. § 9613(h) is a pre-enforcement limit. "[C]ourts have consistently held that where judicial review will delay remedial ... activities, they are barred from reviewing response actions prior to an attempt by the EPA to enforce its orders or allegations of liability" [emphasis added]. Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1387 (5th Cir. 1989). "Section 113(h) of SARA, [footnote omitted] enacted in 1986, codified earlier case law limitations on 'pre-enforcement' review of remedial and removal actions". Id. at 1387-88.

C. Resolution of the Issue of Proper Interpretation of Citizen Enforcement Rights is Important in Order to Ensure that Citizens' CERCLA §§ 9613, 9616, 9617 and NEPA Rights are Preserved

The hazardous waste cleanup involved in Bloomington, Indiana is, without any doubt, a truly major agency action affecting the human environment. It is one of the most extensive operations undertaken in the troubled history of the Superfund program.

All of the parade of horrible chemical poisons, with the possible exception of nuclear radiation, are present here. The specter of poisonous chemical fallout from a recklessly selected experimental hazardous waste incineration facility randomly spreading toxic byproducts across the land is present here. Petitioners represent a genuine community fear and anxiety which, in normal circumstances, would be reflected in the decision record in a major agency action. But not here.

The voices of those willing to express the community's understandable fear and doubt have been ignored and rejected. Instead of making affirmative efforts to insure a good record of public participation in the selection of remedies, here the EPA has gone to great lengths to deny and oppose this participation.

Instead, the record speaks of secret negotiations between major pollution generators to settle lawsuits in which vitally interested citizen groups were denied intervention. It speaks of secret and blatant agency lawlessness which compromised both Petitioners' faith in good government, and in the ability of the federal judiciary to protect the statutory, due process and property rights of Petitioners and other concerned citizens.

When Petitioners turned to the Federal Courts for justice, they were told that the Courts have no jurisdiction to judge and right wrongs if the wrongdoing led to the taking of a Superfund removal or remedial decision despite that the polluter is given full access to the courts, being a party to EPA's longstanding Superfund enforcement suit. Does 42 U.S.C § 9613(h) really mark a boundary across which official lawlessness and denial of due process becomes immune from judicial review?

Surely not. The decision below completely undercuts the citizen enforcement strategy envisioned by Congress as a necessary complement to EPA enforcement, which can best be described historically as too little too late. Under the rule established by the 7th Circuit, all courts in the 7th Circuit will be forced to postpone citizen suits brought to enforce against EPA or industry violations of even the most fundamental requirements of Superfund, as here, until after the illegal action and remedy of which it is part are complete. Violation of any and all of the safeguards painstakingly crafted into the Superfund statutory scheme by Congress are insulated from citizen enforcement under the holding of the 7th Circuit, as well as all the safeguards of NEPA the Clean Water Act, the Clean Air Act and the entire panoply of

environmental laws.

This cannot be what Congress intended. The potential harm to public health and environment and potential waste of billions of tax and industry dollars resulting from such unchecked misguided or blatantly lawless agency action is so great that it is unthinkable that Congress intended to place EPA so high above the law.

The 7th Circuit failed to acknowledge that postponing citizen enforcement against EPA's statutory violations and postponing citizen mandamus actions against the agency's refusal to perform its statutory duties until such actions are moot, which is the clear consequence of the district court's ruling, effectively insulates the agency from enforcement of the very law Congress has charged EPA with upholding. This unwarranted preclusion of review encourages the very agency misconduct which Congress intended to combat by writing in the citizen suit provisions in the 1986 amendments to the Superfund statute.

The 2nd Circuit in Browning Ferris also acknowledged the importance of the jurisdictional issue surrounding interpretation of § 9613(h), and because of the sweeping impact interpretation of the section would have and the difficulty of the issue, declined to resolve the question. Instead, the 2nd Circuit decided the case on the merits after assuming jurisdiction arguendo. 891 F.2d at 154-155. "A comprehensive ruling on the jurisdictional issues would necessarily have a broad impact on future EPA pollution remediation efforts." Id. at 154. "Their resolution would necessarily have a broad impact on an important legislative scheme involving the expenditure of billions of dollars of tax and private money ...." Id. at 160. Such considerations add additional weight to the justification for issuance of a Writ by this Court.

II. Constitutional Issues

A. The Due Process Guarantee of the Fifth Amendment, in the Context of Non-Emergency Hazardous Waste Cleanups under CERCLA Requires More Than After the Fact Public Comment and After the Fact Review by Citizen Suit

In this case Petitioners have been denied their rights to participate in or comment on EPA's development of a cleanup plan, and to bring suit under CERCLA and NEPA to challenge EPA's actions. These rights are vested by statute or regulation.[10] Yet, EPA and the courts below have unjustly prevented Petitioners from exercising their rights.

This Court has recognized that a cause of action, like those provided to Petitioners under NEPA and CERCLA, is a species of property protected by the Due Process Clause.[11] While citizens do not have a right to a particular form of remedy, there is a guarantee, under the due process clause, that a citizen's substantial right to redress by some effective procedure will be preserved. Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). Other courts have similarly held that

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[10] Citizen enforcement of CERCLA is provided in 42 U.S.C. § 9659. Public participation and comment rights are granted under 42 U.S.C. §§ 9613, 9616, 9617 and the NCP (40 C.F.R. § 300.68). Prior to the CERCLA amendments in 1986, public participation rights were granted through the NCP. See, 40 C.F.R. § 300.61 (1982) and the applicable guidelines; 40 C.F.R. § 300.67 (1985). The right for citizens to sue under NEPA is governed by the Administrative Procedures Act (5 U.S.C. § 702) and judicial decisions holding that citizens could act as private attorneys general. Rucker v. Willis, 358 F. Supp. 425 (E.D.N.C. 1973), aff'd 484 F.2d 158.

[11] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Martinez v. California, 444 U.S. 277, 281-282 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-430 (1982).

a right to a judicial hearing must be made at a meaningful time. Boddie v. Connecticut, 401 U.S. 371, 380 (1971); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Logan, 455 U.S. at 437.

Like the situations in Boddie, Logan, Fuentes, and others, Petitioners are being denied any timely and meaningful opportunity to protect their rights in the courts. Their health, property, and environment are threatened by EPA proceeding with a hazardous waste response action in their community without having first assessed the feasibility and environmental impacts of alternative remedial plans, including the plan being implemented. In order for Frey and PATI to protect these important interests, they must have timely access to the courts. Congress' acknowledgement of this fact is shown in the inclusion of citizen suit provisions in almost all recent environmental legislation.

It is true that Congress intended, and the government has an interest, which the public shares, in not delaying urgently needed cleanups. However, EPA has been provided means for dealing with emergencies through its powers to conduct removal actions, to issue administrative orders (42 U.S.C. §9606), or through its power to conduct a fund financed cleanup without delay (42 U.S.C. § 9604). EPA has chosen none of these routes in the instant case and has decided instead to pursue a lengthy litigation (since 1983) on sites known to be contaminated since 1976.

In any case, Congress specifically mandated the RI/FS procedure and public comment to be done to protect public health and environment. The intent of Congress is to have EPA conduct cleanups as quickly as possible in accordance with law, so that proper care is taken. There is no compelling government interest in recklessly rushing to conduct a cleanup in a careless and illegal fashion. The 7th Circuit's decision deprives Petitioners of their entitlement to sue to enforce CERCLA and NEPA and their fundamental right to access to the courts, and is not supported by any

compelling government interest. The 7th Circuit's decision represents a fundamental violation of Due Process and directly conflicts with the above cited decisions of this Court in removing from Petitioners any forum in which they can seek an effective remedy.

B. Provision of Post-Enforcement Judicial Review for the Corporate Wrong-Doer While Denying Review to Citizen's Acting as Private Attorneys General Under CERCLA Offends Fifth Amendment Principles of Equal Protection

Under the 7th Circuit's construction of CERCLA's review provision, 42 U.S.C. § 9613(h), citizens would be denied the right to seek review of the EPA response action both before EPA enforcement and after enforcement but before response implementation. The interests which citizens would seek review to protect after enforcement but before implementation would be their vested right to enforce the requirements of the Act itself, their due process right to comment and an opportunity to be heard on the RI/FS and proposed ROD prior to EPA's final decision on the remedy, their constitutional right to petition for redress, their interest in the value of their property that might be harmed, their interest in their health and that of their families, and their interest in the quality of the environment. Surely these rights and interests of citizen plaintiffs are as worthy of protection as the PRP's mere financial interest?

The CERCLA statute provides for PRPs to challenge an EPA response action through post-enforcement review before implementation, once the EPA has sought injunctive relief, as in the present case. South Macomb Disposal Authority, 681 F.Supp. at 1250; 42 U.S.C. § 9613(h). Thus

pre-implementation review is available to PRPs in these circumstances. To allow PRPs, as a class, access to pre-implementation review while denying the same access to the courts to citizen plaintiffs constitutes a violation of the constitutional guarantee of equal protection of the laws. Bolling v. Sharpe, 347 U.S. 497 (1954). No compelling or even rational basis can be offered to explain this inequitable classification of interests.

Since the CERCLA citizen suit provision (42 U.S.C. § 9659) and the §9613(h) timing of judicial review provision were added by the 1986 Amendments, PRPs often have been denied judicial review prior to completion of EPA response actions unless EPA had brought suit under 42 U.S.C § 9606. However, the statute has generally not been interpreted to deny citizens the right to sue under §9659. In denying PRPs the right to pre-implementation review, the courts have explicitly stated that such a denial is not a violation of due process only because the PRPs, unlike citizen plaintiffs under §9659, have special opportunities to protect their financial interests and seek review later. South Macomb Disposal Authority, 681 F.Supp. at 1251, 1252; Cabot Corp. v. U.S. E.P.A., 677 F.Supp. 823, 829 n.6 (E.D. Pa. 1988). The 7th Circuit's discriminatory classification of citizen plaintiffs into a class that is denied post-enforcement judicial review while responsible parties are placed in a class where such review is available represents a conflict with decisions of this Court upholding citizens' rights to equal protection. Moreover, the 7th Circuit opinion results in the wrong-doer having greater rights than citizens acting as private attorneys general, which is a gross miscarriage of justice.

III. Assuming Arguendo, that 42 U.S.C. § 9613(h) On Its Face Limits Jurisdiction of Post-Enforcement Claims, the 7th Circuit's Failure to Recognize the "Statutory Authority" Exception to Statutory Jurisdictional Limitations is in Direct Conflict with Decisions of this Court

Even assuming that the 7th Circuit's interpretation of CERCLA (42 U.S.C. § 9613(h)) is correct, its refusal to accept jurisdiction over this case for the sole purpose of striking down the outrageous and illegal actions of EPA, directly conflicts with prior well established Supreme Court precedent. A brief discussion of EPA's lawless conduct will set the stage for the analyses of the Court's precedents that follows.

EPA cannot credibly contest the fact that it failed to obey mandatory statutory requirements to : 1) prepare an environmental impact statement (EIS) or a functional equivalent of an EIS as required by the National Environmental Policy Act before choosing a remedy to clean up 700,000 tons of soils and sludges contaminated by PCBs[12], and conduct a Remedial Investigation/Feasibility Study (RI/FS) prior to selecting a clean up remedy as required by CERCLA.[13] In failing to meet these important

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[12] NEPA, 42 U.S.C. § 4332(2)(C) requires the preparation of an EIS for any "major Federal actions significantly affecting the quality of the human environment." The EIS is supposed to discuss environmental impacts and effects, alternatives to the proposed action, the relationship between short term and long term environmental goals, and any irreversible or irretrievable commitments of resources. 42 U.S.C. § 4332(C)(i-v).

[13] 42 U.S.C. §§ 9616(d), 9617 (as amended in 1986). In section 9616 of CERCLA Congress delineated mandatory requirements for the preparation of an RI/FS prior to selecting a clean up remedy for a National Priorities List (NPL) site.

(continued...)

statutory requirements, EPA also intentionally prevented meaningful public participation and scrutiny of the CERCLA clean up remedy selection process. This covert and illegal EPA manipulation of the process kept citizens out of a decision that will effect the health and property of over 100,000 persons in the communities surrounding these horribly contaminated sites and the planned location of the Westinghouse incinerator.

The "public comment", "intensive public scrutiny", "ample opportunity for public comment and involvement" and "numerous opportunities for input into the process"[14] referred to in the erroneous 7th Circuit decision were permitted after the remedy selection was completed, and absent an RI/FS, EIS, or equivalent written analyses. In fact, to this day EPA has refused to designate the information it allegedly relied upon in making its illegal decision. EPA's

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[13](...continued)
Prior to the 1986 amendments to CERCLA, the same RI/FS requirement was articulated in the National Contingency Plan (40 C.F.R. § 300.68 (1982, 1985)). This regulation remains in effect today. Cases that have considered the RI/FS requirement agree that it is a mandatory component of the NPL site clean up process. U.S. v. M. Genzale Plating, Inc., 723 F. Supp. 877, 883 (E.D.N.Y. 1989) ("once a site is listed on the NPL, CERCLA mandates that an RI/FS be commenced in accordance with a designated schedule."); U.S. v. Rohm & Haas Co., 669 F. Supp. 672, 674-675 (D.N.J. 1987); Versatile Metals v. Union Corp., 693 F. Supp. 1563, 1582 (E.D.Pa. 1988). See, also, O'Leary v. Moyer's Landfill, Inc., 677 F. Supp. 807, 811 (E.D.Pa. 1988) for a discussion of the proper procedure for EPA to utilize in selecting a clean up remedy for a site prior to the 1986 SARA amendments.

[14] See, 7th Circuit opinion in appendix at pages 5(a), 7 (a), 14(a), 17(a).

arrogant disrespect for the law and the rights of persons who will be directly and irreparably effected by its decisions in this matter must not be viewed complacently as the stereotypical tension between an over-zealous citizenry and struggling agency that is trying its best to manage its many responsibilities. All Petitioners seek is compliance with the law. At a minimum, EPA must be required to meet this obligation.

In failing to act to correct the blatantly lawless acts of the EPA, the 7th Circuit positioned itself directly in conflict with the decisions of this Court which dictate that the courts have jurisdiction over cases where agencies have exceeded their authority or ignored a specific statutory prohibition. Such oversight is one of the most important roles of the judiciary. In Leedom v. Kyne, 358 U.S. 184 (1958) this Court had cause to exercise its oversight responsibility over the National Labor Relations Board (NLRB). In Leedom, a 233 member professional employees association had petitioned the NLRB for certification as a collective bargaining unit. The NLRB added 9 non-professional employees to the bargaining unit and convened an election. The professional employees objected to the addition of the 9 non-professional employees and asked to exercise their statutory right to vote on the issue. The NLRB refused to grant the professional employees' their opportunity to vote as provided in the National Labor Relations Act (NLRA, 29 U.S.C. 159(b)).

Consequently, the professional employees challenged the NLRB's decision in district court. The district court voided the NLRB's decision as violative of the NLRA. The NLRB appealed, and challenged the district court's jurisdiction to review the NLRB's decision under a provision in the NLRA which limited the ability of the courts to review NLRB bargaining unit certification decisions. The appeals court affirmed the judgement of the district court and decided that it had jurisdiction.

In reviewing the decisions of the lower courts, this Court held that the courts had general jurisdiction to "strike

down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." Leedom, 358 U.S. at 188. The Court reasoned that Congress had provided the professional employees with a specific right to vote on whether or not to accept non-professional employees in their bargaining unit. The NLRB deliberately violated the employees' statutory rights when it refused to allow them to vote on the issue. The Court determined that when Congress limited judicial review of NLRB decisions, it could not have intended to eliminate "judicial protection of rights it confers against agency action taken in excess of delegated powers." Leedom, 358 U.S. at 190. Where Congress has given a right it must intend for that right to be enforced.

The parallels between Leedom and Petitioners' case are striking. Like the NLRB in Leedom, EPA has attempted to hide behind statutory protections limiting judicial review, and has trampled specific rights provided by Congress for citizens affected by NPL site clean ups. The loss of the rights at stake for Petitioners are far greater in this case than the bargaining rights of professional employees defended in Leedom.

Interestingly, another parallel emerges between Petitioners' case and Leedom when the decision of the 7th Circuit is compared with the dissenting opinion in Leedom. In Leedom Justices Frankfurter and Brennan dissented arguing that the limitations upon judicial review were a purposeful effort by Congress to limit "time-consuming court procedures [that] would seriously threaten to frustrate the basic national policy of preventing industrial strife..." Leedom, 358 U.S. at 191. The 7th Circuit used a similar argument to support its position.

> ...challenges to the procedure employed in selecting a [clean up] remedy nevertheless impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the statute; the statute

> necessarily bars these challenges. The judicial review itself slows the process down. [citation omitted][15]

Whether the important statutory objective involves preventing industrial strife or cleaning up NPL sites, agency actions that contradict unambiguous statutory mandates cannot be tolerated by the courts.[16]

Beyond Leedom this Court has used similar rationale to strike down agency actions when they have been beyond the scope of statutory authority. In at least 2 cases this Court acknowledged jurisdiction to overturn the illegal actions of selective service boards despite statutory restrictions on judicial review. Oestereich v. Selective Service Board No. 11, 393 U.S. 233 (1968); Breen v. Selective Service Local Board No. 16, 396 U.S. 460 (1970). In both cases this Court found that the respective Selective Service Boards had acted unlawfully, and concluded that statutory restraints on judicial review did not apply.

Similarly, in a case involving review of a district court remand order, this Court held that the district court had exceeded its statutory authority and that the prohibition against reviewing remand orders did not apply. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976).

Petitioners do not agree with the 7th Circuit's interpretation of their rights under CERCLA or EPA's obligations. However, if the 7th Circuit's statutory analysis

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[15] Frey, 900 F.2d at 1097.

[16] This Court has subsequently interpreted Leedom consistently. See, Boire v. Greyhound Corp., 376 U.S. 473, 480-481 (1964); Brotherhood of Railway & Steamship Clerks v. Assoc. for the Benefit of Non-Contract Employees, 380 U.S. 650, 659-660 (1965); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 16 (1963).

is somehow correct, and judicial review of EPA's post-enforcement actions under CERCLA is properly limited, then the court's authority under the Leedom line of cases should have been invoked to strike down EPA's remedy selection process for failure to complete an EIS, and/or RI/FS, and permit meaningful public participation. By failing to utilize the Leedom exception the 7th Circuit abdicated an important judicial responsibility to hold EPA accountable for actions taken beyond the scope of its delegated powers. Therefore, the 7th Circuit's decision directly conflicts with this Court's precedents and must be subjected to thorough review.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Of Counsel

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Amended: May 31, 1990
May 30, 1990

Before
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge

DAVID SCHALK and
RONALD T. SMITH,
Plaintiffs-Appellants,

No. 89-1141 v.

WILLIAM K. REILLY, Administrator,
U.S. Environmental Protection Agency,
Defendant-Appellee,

and

SARAH E. FREY and **PEOPLE AGAINST THE INCINERATOR (PATI)**, an Unincorporated Association,
Plaintiffs-Appellants,

No. 89-1276 v.

WILLIAM K. REILLY, in his official capacity as administrator of the United States Environmental Protection Agency,
Defendant--Appellee.

Appeals from the United States District Court for the Southern District of Indiana, Indiapolis Division

Nos. 88-C-344 and 88-C-948
S.Hugh Dillin, *Judge*.

AMENDED ORDER

On consideration of the petitions for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by Appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, **DENIED**.

David SCHALK and Ronald T. SMITH,
Plaintiffs-Appellants,
v.
William K. REILLY, Administrator, U.S. Environmental Protection Agency, Defendant-Appellee.

Sarah E. FREY and People Against the Incinerator (PATI), an Unincorporated Association, Plaintiffs-Appellants,
v.
William K. REILLY, in his official capacity as administrator of the United States Environmental Protection Agency, Defendant-Appellee.

Nos. 89-1141, 89-1276.

United States Court of Appeals, Seventh Circuit.

Argued Nov. 28, 1989.
Decided April 24, 1990.

Citizens brought action to challenge consent decree entered into by corporation and Environmental Protection Agency (EPA) concerning clean up of hazardous waste sites. The United States District Court for the Southern District of Indiana, S. Hugh Dillin, J., dismissed for lack of subject matter jurisdiction, and citizens appealed. The Court of Appeals, Manion, Circuit Judge, held that: (1) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the federal court lacked subject matter jurisdiction to consider challenges to remedial actions which had not yet been completed, and (2) federal court lacked jurisdiction to consider EPA's failure to perform an environmental impact study under the National Environmental Policy Act.

Affirmed.

David Schalk, Bloomington, Ind., pro se.
Ronald T. Smith, Bloomington, Ind. pro se.

Deborah J. Daniels, U.S. Atty., Indianapolis, Ind., Martin W. Matzen, M. Alice Thurston, Dept. of Justice, Land & Natural Resources Div., Washington, D.C., for defendant-appellee.

Edward L. Rogers, Washington, D.C., Rudolph W. Savich, Bloomington, Ind., for plaintiffs-appellants.

John Blair, Indianapolis, Ind., Richard E. Condit, Washington, D.C., amicus curiae, for Hoosier Environmental Council and Indiana Public Interest Research Group.

Before WOOD, Jr., RIPPLE, and MANION, Circuit Judges.

MANION, Circuit Judge.

David Schalk and Sara Frey brought separate citizens suit challenges to a consent decree entered into by Westinghouse and the Environmental Protection Agency (EPA) to clean up hazardous waste sites in and around Bloomington, Indiana. The district court separately dismissed both cases for lack of subject matter jurisdiction. Schalk and Frey appealed, and their cases were consolidated. We affirm.

I. Statutory Background

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), provides a statutory scheme for cleaning up hazardous substances. These laws allow the EPA to undertake direct removal or remedial action to protect the

public health or welfare or the environment when it determines that release of a hazardous substance poses an imminent and substantial danger. The EPA may also determine that the party responsible for the release will take appropriate removal or remedial action.[1]

Before remedial action is taken, the site is studied and various cleanup alternatives are considered. The National Oil and Hazardous Substances Pollution Contingency Plan(NCP), 40 C.F.R. Pt. 300 (1988), sets out the criteria and procedures to be followed in comparing remedial alternatives and choosing a response. The NCP in effect when the consent decree in this case was signed required the EPA to prepare a Remedial Alternatives Assessment by signing an Enforcement Decision Document. The Remedial Alternatives Assessment served essentially the same purposes as the present-day Remedial Investigation/Feasibility Study -- determining the nature and extent of contamination, then studying the merits of proposed alternatives. After a period of public comment, the EPA was required to select a remedy and memorialize it in an Enforcement Decision Document (now called a Record of Decision).

The statutory authority for citizens suits pursuant to CERCLA was added by the 1986 SARA amendments, section 310, 42 U.S.C. § 9659. the amendments allow a citizen to maintain a civil action against any person or the government

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[1] Removal refers to short-term action taken to halt the immediate risks posed by hazardous wastes. *See* 42 U.S.C. § 9601(23). Remedial action refers to permanent remedies taken instead of or in addition to removal, and includes destruction of hazardous wastes. *See* 42 U.S.C. § 9601(24). *See also State of Alabama v. EPA*, 871 F.2d 1548, 1551 n. 1 (11th Cir.1989). This case involves a proposed remedial action.

for violating any provision of CERCLA. Section 310(a)(2) provides for suits against the President or any other officer of the United States, including the administrator of the EPA, "where there is alleged a failure . . . to perform any act or duty under [CERCLA]. . . which is not discretionary. . . ." 42 U.S.C. § 9659(a)(2). However, this section is qualified by the phrase "Except as provided in . . . section 9613(h) of this title (relating to timing of judicial review). . . ."

Section 9613(h)(4) provides:

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

* * * * *

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

II. Proceedings

In 1983 the United States sued Westinghouse to force

cleanup of two landfills where Westinghouse had disposed of polychlorinated biphenyl (PCBs) and other hazardous substances. *See United States v. Westinghouse Electric Corp.*, No. IP 83-9-C (S.D.Ind.1981) Two more sites were brought into settlement negotiations in late 1983.

The parties agreed to a consent decree in December 1984 and immediately released its terms to the public. The decree involved all six sites, and required that comprehensive remedial measures be undertaken at each site. The agreement required the measures to be undertaken in two steps: first, a removal action involving surface excavation and capping of abandoned dump sites; and second, the burning of hazardous wastes in a trash-fired incinerator.

The proposed consent decree was subjected to intensive public scrutiny, including 14 public meetings, media interviews and votes before various city, county and state governmental bodies. None of those meetings was required by federal law. The proposed consent decree was approved and signed by each governmental entity that was a party to the litigation. The consent decree was lodged with the district court on May 20, 1985, pending conclusion of a 30-day public comment period required by Department of Justice regulations. *See* 28 C.F.R. § 50.7. This comment period was extended by two weeks at the request of the Bloomington Common Council and area residents.

During this period a number of citizens, including plaintiffs David Schalk and Ronald Smith, commented on the consent decree, raising criticisms similar to those put forward in this lawsuit. Among other things, the comments suggested that the consent decree's proposed remedial measures were inadequate, that there was a lack of opportunity for meaningful public comment and review, that other remedial alternatives were not considered, that incineration is not a safe

method for disposing of PCBs,[2] and that no adequate written assessment of the potential environmental effects of the remedy had been prepared.

The United States responded to the criticisms in its request that the district court approve the final version of the consent decree. The government noted that other methods of treatment and disposal of PCBs were considered and rejected as unsatisfactory. Further, more opportunities for public comment had already been provided than were legally necessary, although further public participation was planned in connection with the processing of permits required by the consent decree. The government further argued that the incinerator would be required to meet regulatory standards to ensure it did not release significant harmful emissions. Finally, the government pointed our that the application process for an incinerator permit required that a risk assessment, along with the results of a test burn, be submitted and evaluated.

The district court approved the consent decree in August 1985, holding that there were numerous public meetings prior to its acceptance, and that the decree was "fair, adequate, reasonable and appropriate."

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[2] David Schalk is the former Bloomington City Chemist, and Ronald Smith succeeded Schalk in that post in 1984. The substantive component of their claim and Frey's claim, which the district court did not reach, is the charge that PCBs -- a type of man-made chemical compound that may harm living organisms -- cannot properly be disposed of by an incinerator. These plaintiffs believe that heating and burning PCBs may even exacerbate damage to the environment and risk poisoning many citizens.

In December of 1987, Schalk filed a *pro se* complaint in the U.S. District Court for the District of Columbia, alleging an "illegal plan to clean up hazardous wastes in and near Bloomington, Indiana" pursuant to the Westinghouse consent decree. Schalk's complaint state that the administrator of the EPA violated federal law by failing to perform an Environmental Impact Statement pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* and a Remedial Investigation/Feasibility Study pursuant to 40 C.F.R. 300.68(f), (g), and (h). Schalk's complaint asked the court to order the EPA to submit a document that complied with the written requirements of an Environmental Impact Statement or the Remedial Investigation/Feasibility Study, and to order the EPA to conduct adequate public hearings.

Plaintiffs Sarah Frey and "People Against the Incinerator," a nonprofit corporation, filed a similar complaint in the U.S. District Court for the District of Columbia in February 1988. Frey accused the EPA of taking "unlawful actions" in connection with the plan to clean up hazardous wastes in Bloomington. Frey attacked the EPA's failure to authorize an Environmental Impact Statement, its failure to allow meaningful public participation and its failure to study other potential remedial measures. Frey sought declaratory and injunctive relief that would require EPA to conduct further studies required by the National Environmental Policy Act and select an appropriate remedy "on the basis of proper studies," and without giving any special weight to the agency determination in favor of an incinerator.

Both cases were removed to the Southern District of Indiana, which handled the *Westinghouse* case. In December of 1988, the district court separately dismissed each complaint for lack of subject matter jurisdiction. The district court concluded that the citizens suit provision of CERCLA, as amended by SARA, deprived the court of jurisdiction. Although the district court found the statute to be "not entirely

clear," it examined legislative history and ruled that preenforcement review of EPA removal actions was premature.

In this consolidated appeal, the plaintiffs provide us with numerous reasons why they believe the district court had jurisdiction. They argue (1) that the section removing jurisdiction from the federal courts is inapplicable because this is a postenforcement challenge; (2) that the statute is improperly being applied retroactively; and (3) that they are not "challenging" a remedial action within the meaning of the statute.

We affirm the district court's judgement that it lacked subject matter jurisdiction over both suits. However, because the statute's plain language substantiates our holding, an extensive examination of the legislative history, as performed by the district court, is not necessary.

III. Analysis

A. CERCLA's Plain Language

[1] Federal court review of the remedial action proposed by Westinghouse and the EPA in their consent decree is explicitly barred by CERCLA's plain language. Under the heading "Timing of review," 42 U.S.C. § 9613(h) limits federal court jurisdiction to five specific circumstances. Plaintiffs assert that § 9613(h)(4), one of the five circumstances, confers jurisdiction on their challenge to their remedial action. In conjuncture with relevant portions of § 9613(h)(4), it reads:

> No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected . . . except . . .

* * * * * *

> (4) An action under section 9659 . . . alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site. (Emphasis added.)

The obvious meaning of this statue is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy. As the Eleventh Circuit explained in *State of Alabama v. EPA*, 871 F.2d 1548, 1557 (11th Cir. 1989) (emphasis in original):

> The plain language of the statute indicates that section 113(h)(4)[3] applies only after a remedial action is actually completed. The section refers in the past tense to remedial actions taken under section 104 or secured under 106. Absent clear legislative intent to the contrary, this language is conclusive.

[2] The final sentence in (h)(4) provides further support for this understanding of the statute's plain meaning. In a challenge to a removal action where a remedial action "is to be undertaken," no action may be brought. That is our situation. An incinerator has been chosen as the method to dispose of hazardous wastes in the Bloomington area, but the remedial action outlined in the consent decree has not yet been undertaken. Congress intended by this statute to prevent unnecessary delay in implementing hazardous waste cleanups.

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[3] CERCLA section 113(h)(4) is codified at 42 U.S.C. § 9613(h)(4).

That type of delay would surely result if plaintiffs were successful in requiring the EPA to conduct Environmental Impact Statements and further Feasibility Studies. The statue precludes federal court review at this stage -- when a remedial plan has been chosen, but not "taken" or "secured."

B. CERCLA's Legislative History

Because we believe the plain language of the statue is clear, we need not engage in the lengthy examination of legislative history undertaken by the district court.[4] To the extent that we do review the legislative history, we are persuaded the district court correctly determined that the history supported its construction of the statute. The legislative history supports the conclusion that federal courts are deprived of subject matter jurisdiction where remedial action has not been completed. The Eleventh Circuit reached the same result in Sate of Alabama v. EPA: "The legislative history behind this section supports rather than clearly contradicts this conclusion." 871 F.2d at 1557.

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[4] While the district court found the plain language of the statute "not entirely clear," that description more appropriately describes the statute's legislative history. Both sides support their interpretation of the statute with lengthy quotations from senators and congressmen trying to put their spin on the statute's interpretation; these contradictory explanation further demonstrate the dangers of judicial reliance on legislative history instead of statutory text. *See, e.g., U.S. v. Taylor*, 487 U.S. 326, 108 S.Ct. 2413, 2423-2424, 101 L.Ed.2d 287 (1988) (Scalia, J., concurring); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 107 S.Ct. 1207, 1224, 94 L.Ed.2d 434 (1987)(Scalia, J., concurring); Wallace v. Christensen, 802 F.2d 1539, 1560 (9th Cir.1986)(Kozinsky, J., dissenting).

The final conference committee report that reconciled conflicting House and Senate versions explained that only "completed" remedial actions could be challenged. H.R.Re. No. 962, 99th Cong., 2d Sess. 224 (1986) U.S.Code Cong. & Admin. News 1986, p. 2835. The House Committee on Energy and Commerce stated that "there is no right to judicial review of the Administrator's selection and implementation of response actions until after the response action have been completed to their completion [sic]." H.R.Rep. No. 253(I), 99th Cong., 2d Sess. 81 (1986), U.S. Code Cong. & Admin News 1986, p.2863. The house Judiciary Committee noted that "[t]his provision is not intended to allow review of the selection of a response action prior to completion of the action. . . . " H.R.Rep. No. 253(III), 99th Cong., 2d Sess. 23 (1986), U.S.Code Cong. & Admin News 1986, p.3046. These committee reports, along with many other statements of congressional leaders, far outweigh the few contrary remarks of individual legislators cited by plaintiffs. The statute as written clearly states the intent of Congress.

C. Applicability of the SAR Amendments

The plaintiffs contest the applicability of § 9613(h) to this case on essentially two theories. First, they argue that "retroactive" application of the 1986 SARA amendments to the 1984 consent decree creates a "manifest injustice." Second, they contend that this isn't really a "challenge" at all within the meaning of the statute. Neither of these contentions have merit.

[3] Frey suggests that the district court's use of 42 U.S.C. § 9613(h) to concluded that it lacked jurisdiction was improper because it constitutes retroactive application of that statute. This argument fails for two reasons. First, the jurisdiction of the district court over the 1984 consent decree was not at issue; the jurisdiction of the court over the

plaintiffs' claims was. Both plaintiffs filed their citizens suit challenges after the effective date of the 1986 SARA amendments; Schalk in August 1987 and Frey in March 1988. Second, even if this is considered "retroactive" application, a court should "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction of legislative history to the contrary." *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). The plaintiffs' arguments for "manifest injustice" are unpersuasive. *See U.S. v. Seymour Recycling Corp.*, 679 F.Supp. 859 (S.D.Ind.1987)(plaintiffs seeking injunction to halt EPA cleanup not deprived of due process by retroactive application of CERCLA). The jurisdictional bar in SARA merely codified the established rule that preimplementation review of response actions would not be allowed. *See e.g., Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 886-87 (3rd Cir.1985), *cert. denied*, 476 U.S.1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986) ("The statutory approach to the problem of hazardous waste is inconsistent with the delay that would accompany pre-enforcement review. . . . [W]e find in [CERCLA] an implicit disapproval of pre-enforcement judicial review."); *State of Alabama v. EPA*, 871 F.2d at 1558 ("Prior to the 1986 amendments that enacted section 113(h), courts uniformly held that challenges to a Record of Decision were barred before full implementation.") Furthermore ample opportunity for public comment and involvement has been provided and much more will be allowed prior to implementation. This is not the plaintiffs' only chance to stop the incinerator.[5] No injustice is created

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[5] The government points our that in addition to the public participation already provided by the EPA according to Department of Justice regulations, 28 C.F.R. § 50.7, further opportunities will present themselves as plans for the

(continued...)

by applying current law.

[4] The plaintiffs also assert that they are not really challenging the consent decree or its choice of an incinerator, but merely asking that certain procedural requirements be met. However, challenges to the procedure employed in selecting a remedy nevertheless impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the statute; the statute necessarily bars these challenges. The judicial review itself slows the process down. *See Jefferson County v. United States,* 644 F.Supp. 178, 182 (E D.Mo.1986) ("[J]udicial review of agency clean-up activities would hinder and delay the hazardous waste disposal. This delay would be inconsistent with the intent of congress to allow swift clean-up actions.")

[5] In any event, the plaintiffs are in fact challenging the remedy selected; the purpose of Environmental Impact Statements and Feasibility Studies can only be to demonstrate the need for a different remedy. Counsel for plaintiffs admitted at oral argument that if one of those studies suggested a better remedy the next step would be to enjoin implementation of the consent decree. *See State of Alabama v. EPA*, 871 F.2d at 1559 (rejecting plaintiffs' argument that they were not "challenging" the remedial action plan selected since they were asking that it be enjoined). The district court correctly concluded that a "fair reading of plaintiffs' complaint here reveals that it is the EPA's selection of a remedy, not the implementation, that plaintiffs are

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[5](...continued)
incinerator take shape. The consent decree requires Westinghouse to obtain at least nine permits and approvals prior to construction of the incinerator, all of which require public input and are appealable.

challenging." In briefs and at oral argument, plaintiffs have persisted in attacking and ridiculing the incinerator remedy as dangerous, untested, and unworkable. At oral argument Frey's attorney reiterated that these studies should have been done "before they made their decision," and should still be performed "before [the incinerator project] goes forward."

D. Jurisdiction Under the Administrative Procedure Act

[6] The district court properly rejected plaintiffs' argument that the court had jurisdiction to consider the EPS's failure to perform an Environmental Impact Study under the National Environmental Policy Act (NEPA). while NEPA claims are presumptively reviewable under 28 U.S.C. § 1331 in conjunction with the Administrative Procedure Act (APA), 5 U.S.C. § 702, APA review is not available when a federal statute specifically precludes judicial review. *Block v. Community Nutrition Institute*, 467 U.S. 340, 345, 104 S.Ct. 2450, 2453, 81 L.Ed.2d 270 (1984). As the Eleventh Circuit stated in rejecting an identical assertion of jurisdiction:

> We have already concluded that Congress intended to remove challenges to remedial action plans from the jurisdiction of the federal courts until the remedial action has been taken. The district court thus lacked subject matter jurisdiction over the claims brought under the APA.

State of Alabama v. EPA 871 F.2d at 1560.

E. Constitutional Deprivations

Plaintiffs and amicus curiae Indiana Public Interest Research Group assert that plaintiffs' Fifth Amendment rights to substantive and procedural due process, meaningful access

to the courts, and equal protection are violated by the district court's dismissal for lack of subject matter jurisdiction. These novel theories rest on undesirable expansions of the meaning of the Fifth Amendment, and we decline to adopt them. As we already have made clear, the plaintiffs in this matter and other interested citizens have received numerous opportunities for input into the process, and will receive more such opportunities in the future. No recognized constitutional rights are implicated.

IV. Conclusion

Federal courts lack subject mater jurisdiction to consider challenges to remedial actions that have not been "taken" or "secured." The judgement of the district court dismissing the action for lack of subject matter jurisdiction is therefore

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SARAH ELIZABETH FREY and PEOPLE AGAINST THE INCINERATOR (PATI)	)	
Plaintiffs,	)	
-vs-	)	NO. IP 88-948-C
LEE M. THOMAS, Administrator, United States Environmental Protection Agency,	)	
Defendant.	)	

JUDGMENT

The Court having this day filed its entry in the above captioned matter in the following words and figures: (H. I.), now therefore in accordance therewith,

IT IS CONSIDERED AND ADJUDGED that plaintiffs' complaint is herby dismissed without prejudice for lack of subject matter jurisdiction.

Date this 6th day of December , 1988.

S. Hugh Dillin, Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SARAH ELIZABETH FREY and PEOPLE AGAINST THE INCINERATOR (PATI)	)	
Plaintiffs,	)	
-vs-	)	NO. IP 88-948-C
LEE M. THOMAS, Administrator, United States Environmental Protection Agency,	)	
Defendant.	)	

ENTRY

This cause is before the Court on a motion by defendant, Lee M. Thomas, Administrator of the United States Environmental Protection Agency ("EPA"), to dismiss plaintiffs' complaint for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted, pursuant to Rules 12 (b)(1) and 12(b)(6), F.R.Civ.P. For the following reasons, the motion to dismiss is granted, and plaintiffs' complaint is dismissed for lack of subject matter jurisdiction.

Background

Plaintiffs, Sarah Elizabeth Frey and People Agains the Incinerator (PATI), residents of Bloomington, Indiana, filed this action in February 1988 in the United States District Court for the District of Columbia pursuant to the cintizen's suit provisions of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. § 9659. Plaintiffs allege that in acting to clean up ploychlorinated biphenyl ("PCB") contamination in Monroe County, Indiana, the United States government, through EPA, failed to perform nondiscretionary statutory and regulatory duties. The cause was transferred to this court in August 1988.

Plaintiffs' complaint arised out of action taken by the EPA in the early 1980s. In response to PCB contamination of several sites in Monroe County, the EPA, in Janyuary 1983, brought suit against Westinghouse Electric Corporation in this court. The State of Indiana intervened as a plaintiff, the Monsanto Company was joined as a third-party defendant, and the case was ultimately consolidated with an earlier suit filed by the City of Bloomington against Westinghouse. In late 1983 and 1984, the parties to these consolidated actions engaged in settlement negotiations which culminated in a proposed consent decree approved by the Court in August 1985, whereby Westinghouse assumed major responsibility for cleaning up the PCB contamination, with extensive oversight by the various government entities involved.

In the present action, plaintiffs contend that in evaluating the PCB contamination in Monroe County and in working out the terms of the consent decree, the EPA failed to prepare an Environmental Impact Statement ("EIS"), as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(c), and failed to conduct an adequate Remedial Investigation/Feasibility Study

("RI/FS"), as required by the Comprehensive Environmental Response, Compentation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9605, and its implementing regulations codified at 40 C.F.R § 300.68. Plaintiffs request the Court to order the EPA to provide these documents and studies. Defendant has moved to dismisss plaintiffs' complaint, arguing plantiffs' claims are barred by the doctrines of stare decisis and law of the case and that the Court lacks subject matter jurisdiction of this cause of action.

Discussion

It is axiomatic that a federal court, as a court of limited jurisdiction, cannot proceed to adjudicate a dispute over which it lacks subject matter jurisdiction. Plaintiffs contend jurisdiction is conferred by the citizen's suit provisions of SARA, 42 U.S.C. § *et seq.*

Considering first whether the APA confers jurisdiction, the Court notes that while 5 U.S.C. § 702 provides a general right to judicial review of action by an administrative agency, § 701(a)(1) restricts application of this provision where federal statues preclude judicial review. The Supreme Court has interpreted these provisions as barring judicial review where a specific statute, considered in light of its legislative history, reflects a congressional intent to limit judicial review of specific agency action. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345-46, 104 S.Ct. 2450, 2453-54, 81 L.Ed.2d 270, 275-76 (1984).

In case at hand, a specific statute, SARA, directly addresses the scope of judicial review of EPA actions in these circumstances. In SARA, Congress expressly stated:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:
>
> . . . .
>
> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

42 U.S.C. § 9613(h). It is undisputed that the EPA action of which plaintiffs complain involves removal or remedial action pursuant to sections 104 and 106(a) of CERCLA, 42 U.S.C. §§ 9604, 9606(a). Thus, by the express language of Congress, the only basis of jurisdiction of plaintiffs' challenge to this EPA remedial action is SARA's citizen's suit provision.

This analysis is consistent with that of the Eleventh Circuit, which found that the limited judicial review provisions in 42 U.S.C. § 9613(h) reflected congressional intent to preclude more expansive judicial review that might otherwise be available under the APA. *Dickerson v. Administrator, EPA*, 834 F.2d 974, 977-78 (11th Cir. 1987); *cf. Wheaton Indus. v. United States EPA*, 781 F.2d 354, 356-57 (3d Cir. 1986); *Jefferson County, Mo. v. United States*, 644 F. Supp. 178, 181-82 (E.D.Mo. 1986)

(pre-SARA cases finding specific provisions and congressional intent in CERCLA control general judicial review provisions of APA). Accordingly, the Court finds that the APA does not provide a jurisdictional basis for this lawsuit.

Plaintiffs also assert subject matter jurisdiction pursuant to the citizen's suit provision of SARA, which states:

> Except as provided in subsections (d) and (e) of this section and in section 9613(h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf --
>
> . . . .
>
> (2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or such other officer to perform any act or duty under this chapter, . . . which is not discretionary with the Presidency or such other officer.

42 U.S.C. § 9659(a)(2). The words "this chapter" in the statue refer to CERCLA, 42 U.S.C. § 9601 *et seq.* Plaintiffs here allege a failure to perform two nondiscretionary acts -- a failure to provide an Environmental Impact Statement ("EIS") and conduct an adequate Remedial Investigation/Feasibility Study ("RI/FS").

The National Environmental Policy Act ("NEPA") requires federal agencies to prepare an EIS whenever they undertake major action affecting the environment. *See* 42 U.S.C. § 4332(C). However, NEPA is not CERCLA, and is in a different chapter of the United States Code. Thus,

SARA's citizen's suit provision cannot be used to compel a federal official to perform an act allegedly required by NEPA. Because, as noted above, the only possible basis for jurisdiction of plaintiffs' challenge to EPA action taken pursuant to §§104 and 106(a) of CERCLA is this citizens' suit provision and because the citizen's suit provision does not encompass NEPA, the Court finds no jurisdictional basis for plaintiffs' allegation under NEPA. Plaintiffs' claim that the EPA failed to provide an EIS is therefore dismissed for lack of subject matter jurisdiction.

Finally, the Court must consider whether it has jurisdiction, pursuant to 42 U.S.C. § 9659(a)(2), of plaintiffs' claim that the EPA failed to conduct an adequate RI/FS. Section 9659(a) of 42 U.S.C. provides that citizens' suits are controlled by the timing of judicial review provisions of 42 U.S.C. § 9613(h), set out on page 4 hereof.

Defendant argues that this section precludes judicial review under the citizen's suit provision until the remedial action selected by the EPA has been taken or secured. Finding that the statute is not entirely clear about just when in the course of a remedial action a citizen's suit may be brought, the Court will look to the legislative history of this section. In describing this provision of SARA, the House Committee on Energy and Commerce stated:

> Review may also occur pursuant to the terms of a consent decree, through a citizen suit alleging that the response action that had been taken was in violation of the requirements of the Act, or through a reimbursement suit by a potentially responsible party under the new procedures provided in this section. The section is intended to codify the current position of the Administrator and the Department of Justice with respect to pre-enforcement review: there is no

> right of judicial review of the Administrator's selection and implementation of response actions until after the response action have been completed to their completion [sic].

H.R. Re. No. 253(I), 99th Cong., 2d Sess. 81, *reprinted in* 1986 U.S. Code Cong. & Admin. News, 2835, 2863.

According to the House Judiciary Committee:

> This provision is not intended to allow review of the selection of a response action prior to completion of the action: the provision allows for review only of an "action taken . . . ." Thus, after the RI/FS has been completed, the remedial action has been selected and designed, and the construction of the selected action has begun, persons will be able to maintain suit to ensure that a specific on-the-ground implementation of the response action is consistent with the requirements of the Act. For example, a suit under this provisions [sic] may be appropriate where a specific aspect of the remedial action, which has been taken, in fact fails to attain a standard required under this Act. The Committee emphasizes that this paragraph is not intended to allow delay of the clean-up and that, in actions under this paragraph, courts should not entertain claims to re-evaluate the selection of remedial action. Also, in reviewing actions under this sub-section, the courts should used their powers to ensure that such review does not disrupt clean-up remedies.

H.R. Rep. no. 253(III), 99th Cong., 2d Sess. 23, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3038, 3046 (emphasis added by the Committee). A fair reading of plaintiffs' complaint here reveals that it is the EPA's selection of a remedy, and not the implementation, that plaintiffs are challenging.

Finally, the Conference Committee explained:

> In new section 113(h)(4) of the substitute, the phrase "removal or remedial action taken" is not intended to preclude judicial review until the total response action is finished if the response action proceeds in distinct and separate stages. Rather an action under section 310 [42 U.S.C. § 9659] would lie following completion of each distinct and separate phase of the cleanup. For example, a surface cleanup could be challenged as violating the standards or requirements of the Act once all the activities set forth in the Record of Decision for the surface cleanup phase have been completed.... Any challenge under this provision to a completed stage of a response action shall not interfere with those stages of the response action which have not been completed.

H.R. Conf. Rep. 962, 99th Cong.., 2d Sess. 224 *reprinted in* 1986 U.C. Code Cong. & Admin. News 3276, 3317.

Comments from the floor debates shed further light on Congress' intent with respect to the timing of citizens' suits. Senator Thurmond explained:

> [The preenforcement review] provision confirms and builds upon existing case law. In particular, the timing of review section ensures that Government and private cleanup resources will be directed toward mitigation, not litigation. The section is designed to preclude piecemeal review and excessive delay of cleanup. Interested parties will be able to participate early in a more regularized administrative process instead of making premature challenges in court to remedy selection or liability.
>
> . . .[C]itizen suits. . . must be utilized in a manner consistent with the timing of review

provisions.

The timing of review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the response actions that are performed by EPA and other Federal agencies, by States pursuant to a cooperative agreement, and by private parties pursuant to an agreement with the Federal Government. The section also covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.

. . . [T]here is no jurisdiction to review a response action through a citizen suit except as provided in the timing of review section. Citizens . . . cannot seek review of the response action . . . unless the suit falls within one of the categories provided in this section . . . .

. . . .

. . .[Under the timing of review] provision, no person may bring any lawsuit in Federal court regarding a federally approved removal or remedial action except when the removal action has been completed or when the remedial action has been taken or secured. "Taken or secured" means that all of the activities set forth in the record of decision which includes the challenged action have been completed. . . . Thus, for example, review of the adequacy of a remedial investigation and feasibility study, which is a removal action, would not occur until the remedial action itself had been taken.

The section is designed to preclude lawsuits by any person concerning particular segments of the response action . . . until those segments of the response have been constructed and given the chance to operate and demonstrate their effectiveness in meeting the requirements of the act.

132 Cong. Rec. S14,928-29 (daily ed Oct. 3, 1986)

(emphasis added). By this interpretation, plaintiffs' action here assailing the adequacy of a RI/FS could not be brought until the remedial action has been implemented.

In explaining to the House of Representatives the permissible timing of citizen's suits, Representative Glickman made essentially the same remarks as Senator Thurmond. *See* 132 Cong. Rec. H9,582 (daily ed. Oct, 1986) (remarks of Rep. Glickman).

> Similarly, Senator Mitchell stated that in response to concerns that citizens would not be able to enforce the standards until the remedy was complete [and that in some cases where treatment] could take decades and thus citizens would be barred from suit until it was too late to effect an improved remedy . . . .
>
> The conferees agreed that some preimplementation review would be provided so that citizens would not be disadvantaged by having to wait until cleanup was complete . . . A suit to compel compliance with the CERCLA standards would be permitted, under section 113(h) after each stage of cleanup is complete. In this way, an entire cleanup need not be complete before a citizen can sue.

132 Cong. Rec. S14, 917 (daily ed. October 3, 1986).

Some Congressmen had a somewhat different perception of what section 9613(h)(4) means with respect to the timing of citizen's suits. Representative Roe opined:

> The legislation allows citizens to bring a lawsuit under section 310 as soon as the agency announces its decision regarding how a cleanup is structured. A final cleanup decision, or plan, constitutes the taking of action at a site, and the legislative language makes it clear that citizens' suits . . . will lie . . . as soon as . . . "action is taken."

132 Cong. Rec. H9,600 (daily ed. Oct. 8, 1986). Senator Stafford appears to have had the same impression:

> It is crucial, if it is at all possible, to maintain citizens' rights to challenge response action, or final cleanup plans, before such plans are implemented even in part because otherwise the response could proceed in violation of the law. . . .

132 Cong. Rec. S14, 898 (daily ed. Oct. 3, 1989). however, Representative Glickman, responding to a question about Senator Stafford's comments, suggested that the Senator was "attempting to revise the Superfund conference agreement under the guise of interpretation" and declared emphatically that the sentence quoted above was "clearly contrary to the conference agreement." 132 Cong. Rec. H9, 582 (daily ed. Oct. 8, 1986).

Representative Glickman continued:

> [T]he conferees explicitly agreed that all persons would have the same limited access to preimplementation judicial review.
>
> [Senator Stafford's] approach assumes that section 113(h) of the conference report allows judicial review of challenges to the selection of the remedy -- cleanup plan -- before the remedy is implemented -- built. This is clearly not the effect of section 113(h). The statement of managers accompanying the conference report is explicit on this point.

Id. Representative Glickman further explained that despite arguments that permitting the EPA to proceed with an inappropriate remedy might waste money,

> the conferees decided to ensure expeditious cleanups by restricting such preimplementation review. To balance this restriction on judicial review of the remedy selected by the EPA, the conferees included provisions that require EPA to develop extensive procedures for public participation in the selection of

> the cleanup plant and the compilation of an administrative record.
>
> . . . .
>
> . . . Clearly the conferees did not intend to allow any plaintiff, whether the neighbor who is unhappy about the construction of a toxic waste incinerator in the neighborhood, or the potentially responsible party who will have to pay for its construction, to stop a cleanup by what would undoubtedly be a prolonged legal battle. It was for this very reason that the conferees included section 113(h).

Id. at H9,583. The Court finds that the interpretations of Senator Thurmond and Representative Glickman precluding a citizens' suit challenging EPA action until at least the first phase of the remedy has been implemented are far more consistent with the official committee reports accompanying SARA than is that of Senator Stafford. *See* H.R. Re. No. 253(I), 99th Cong., 2d Sess. 81; H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 224, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2863, 3046, 3317.

In light of this legislative history, the Court finds that 42 U.S.C. § 9613(h)(4) permits citizens' suits challenging EPA actions only once a remedial action or discrete phase of a remedial action has been completed. As the eleventh Circuit noted, "42 U.S.C. § 9613(h) clearly provides that federal courts do not have subject matter jurisdiction for preenforcement reviews of EPA removal actions pursuant to section 9604." *Dickerson*, 834 F.2d at 977 (footnote omitted); *cf. United States v. Rohm & Haas Co.*, 669 F. Supp. 672 (D.N.J. 1987) (permitting judicial review, pursuant to section 9613, of EPA procedures in selecting a remedy once first phase of cleanup was completed). Although one federal district court has stated that section 9613(h)(4) "arguably permits citizens' suits to be brought before an EPA response action is implemented, *see Cabot Corp. v. United States EPA*, 677 F.Supp. 823, 828-29

(E.D.Pa. 1988), this comment is dictum and is based on only a partial review of the legislative history.

Therefore, because the EPA remedial action challenged here by Frey and PATI has not yet been implemented, the Court finds their citizen's suit is premature pursuant to 42 U.S.C. § 9613(h)(4). Accordingly, the Court must dismiss plaintiffs' complaint for lack of subject matter jurisdiction.

Dated this 6th day of December, 1988.

FILED
OCT 25
JOSEPH F. SPANIOL, JR.

No. 90-354

In the Supreme Court of the United States

OCTOBER TERM, 1990

SARAH ELIZABETH FREY, ET AL., PETITIONERS

v.

WILLIAM K. REILLY, Administrator,
Environmental Protection Agency

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 113(h)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9613(h)(4), precludes judicial review of petitioners' challenge to a proposed remedial action under Sections 104 and 106 of CERCLA, 42 U.S.C. 9604 and 9606.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) is reported at 900 F.2d 1091. The opinion of the district court (Pet. App. 18a-31a) is reported at 28 Env't Rep. Cas. (BNA) 1655.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1990. A petition for rehearing was denied, as amended, on May 31, 1990. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on August 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. 9601 *et seq.*, provides detailed procedures for cleaning up releases or threatened releases of hazardous substances. Under Section 104(a)(1) of CERCLA, 42 U.S.C. 9604(a)(1), for example, the Environmental Protection Agency may take so-called "removal" or "remedial" action

> * * * [w]henever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare * * *.

If the EPA determines that the facility's owner or another responsible party will take such action promptly and properly, it may "allow such person to carry out the action." *Ibid.*[1] Before either the EPA or a private individual takes remedial action, the EPA (or in appropriate cases, an interested party under the EPA's supervision) studies the site, exam-

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[1] A removal action typically involves the EPA's first steps at a hazardous waste site—for example, fencing, excavating, and disposing of the most contaminated soils—in order to stabilize the threat. See 42 U.S.C. 9601(23). A remedial action, on the other hand, typically involves the EPA's steps to ensure a permanent clean-up of the site—for example, groundwater pumping and treating, and excavating and disposing of all contaminated soils—to eliminate the threat. See 42 U.S.C. 9601(24); 40 C.F.R. 300.6. This case involves a remedial action.

ines alternative remedies, and ultimately the EPA selects a preferred clean-up remedy. See 42 U.S.C. 9605; 40 C.F.R. Pt. 300 (1983) (National Oil and Hazardous Substances Pollution Contingency Plan (NCP)).[2]

As amended by SARA, Pub. L. No. 99-499, 100 Stat. 1613, Section 310 of CERCLA, 42 U.S.C. 9659 —the citizen suit provision—enables any person to commence a civil action on his own behalf against any person or the government for violating the statute, 42 U.S.C. 9659(a)(1), and specifically provides for suits against the EPA "where there is alleged a failure * * * to perform any act or duty under [CERCLA] * * * which is not discretionary * * *" 42 U.S.C. 9659(a)(2). Judicial review of citizen-suit challenges, however, is circumscribed by Section 113(h) of CERCLA, 42 U.S.C. 9613(h).

Section 113(h), which governs "timing of review," provides in pertinent part:

> No Federal court shall have jurisdiction under Federal law other than section 1332 of title 28 * * * or under State law which is applicable or relevant and appropriate under section 9621 * * * (relating to clean-up standards) to review any challenges to removal or remedial action selected under section 9604 * * *, or to review any order issued under section 9606(a) * * *, in any action except one of the following:
>
> (1) An action under section 9607 * * *.
>
> (2) An action to enforce an order issued under section 9606(a) * * *.

---

[2] The current NCP—applicable to remedies undertaken after 1985—appears at 55 Fed. Reg. 8865 (1990) (to be codified at 40 C.F.R. Pt. 300)).

> (3) An action for reimbursement under section 9606(b)(2) * * *.
>
> (4) An action under section 9659 * * * alleging that the removal or remedial action *taken* under section 9604 * * * or *secured* under section 9606 * * * was in violation of any requirement of this [Act] * * *.
>
> (5) An action under section 9606 * * * in which the United States has moved to compel a remedial action.

42 U.S.C. 9613(h) (emphasis added).

2. In January 1983, the EPA filed a federal court action against Westinghouse Electric Corporation under Sections 104, 106, and 107 of CERCLA, 42 U.S.C. 9604, 9606, and 9607, and provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, seeking the cleanup of hazardous substances and wastes at two sites in Bloomington, Indiana. See *United States* v. *Westinghouse Elec. Corp.*, No. IP 83-9-C (S.D. Ind.).[3] As a result of remedial alternative assessments undertaken by the EPA, in accord with the NCP, and after intensive negotiations, the parties reached a settlement agreement in December 1984 providing for "comprehensive remedial measures to be undertaken at each site [at issue]." Pet. App. 7a. As explained by the court of appeals,

> [t]he agreement required the measures to be undertaken in two steps: first, a removal action involving surface excavation and capping of

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[3] In 1981, the City of Bloomington had filed a separate federal court action under CERCLA against Westinghouse, seeking the cleanup of two other sites. See *City of Bloomington* v. *Westinghouse Electric Corp.*, No. IP 81-448-C (S.D. Ind.). After the filing of the EPA's lawsuit, the district court consolidated the actions.

> abandoned dump sites; and second, the burning of hazardous wastes in a trash-fired incinerator.

Ibid.

The parties released the settlement agreement—embodied in a proposed consent decree—to the public on December 3, 1984. Beginning on December 5, "[t]he proposed consent decree was subjected to intensive public scrutiny, including 14 public meetings, media interviews and votes before various city, county and state governmental bodies." Pet. App. 7a.[4] After the parties approved and signed the consent decree, they lodged it with the district court on May 20, 1985, pending conclusion of the thirty-day public comment period prescribed by Department of Justice regulations. See 28 C.F.R. 50.7.[5]

During the public comment period, a number of concerned citizens—including David Schalk and Ronald Smith—submitted comments to the government opposing the proposed consent decree.[6] As summarized by the court of appeals, those comments

> suggested that the consent decree's proposed remedial measures were inadequate, that there was a lack of opportunity for meaningful public com-

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[4] As the court of appeals pointed out, "[n]one of those meetings was required by federal law." Pet. App. 7a.

[5] At the request of the Bloomington Common Council and area residents, the government extended the comment period for an additional two weeks—until July 8, 1985. Pet. App. 7a.

[6] In 1988, Schalk and Smith filed a federal court action challenging entry of the *Westinghouse* consent decree. The district court dismissed the action as premature under Section 113(h)(4) of CERCLA, 42 U.S.C. 9613(h)(4), and the court of appeals—after consolidating that case with petitioners' action—affirmed. Pet. App. 9a-10a. Schalk and Smith have not filed a separate petition for a writ of certiorari.

> ment and review, that other remedial alternatives were not considered, that incineration is not a safe method for disposing of [hazardous substances], and that no adequate written assessment of the potential environmental effects of the remedy had been prepared.

Pet. App. 7a-8a. In August 1985, the EPA responded to the public comments noting, among other things, that other methods of treatment and disposal of the hazardous substances had been considered and rejected as unsatisfactory, that more opportunity for public comments than legally required had already been provided, and that additional opportunities were planned in connection with the processing of specific permits required by the consent decree.[7] On August 22, 1985, the district court approved and entered the consent decree.

3. In February 1988, petitioners filed this federal court action against respondent, the Administrator of the EPA, raising a number of challenges to the adoption of the remedial plan contained in the *Westinghouse* consent decree.[8] In particular, petitioners alleged that respondent had violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.

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[7] In this case, for example, before the waste-disposal facilities the consent decree calls for can be constructed, federal and state laws, including RCRA and the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.*, require extensive permitting and approval processes subject to a period of public comment and—if appropriate—public hearings and appeals. See Pet. App. 14a n.5.

[8] Petitioners initially filed the action in the District of Columbia. In July 1988, the district court transferred the action—together with the similar lawsuit filed by Schalk and Smith, see note 6, *supra*—to the Southern District of Indiana. Pet. App. 9a.

4321 *et seq.*, by not preparing an environmental impact statement with regard to the remedial plan selected, by failing to study remedial alternatives, and by failing to provide meaningful public participation in the remedial selection process. See Compl. ¶¶ 54-61, 66-68. In addition, petitioners claimed that respondent had violated Section 105 of CERCLA, 42 U.S.C. 9605, by not preparing a remedial investigation and feasibility study (RI/FS) before selecting the remedial plan, and that each of respondent's unlawful actions violated the Administrative Procedure Act, 5 U.S.C. 553, 706. See Compl. ¶¶ 69-75. Petitioners sought declaratory and injunctive relief.

In September 1988, the government moved to dismiss petitioners' complaint, contending that Section 113(h)(4) of CERCLA, 42 U.S.C. 9613(h)(4), deprived the court of subject matter jurisdiction over petitioners' particular challenge to the proposed remedial action under Sections 104 and 106 of CERCLA, 42 U.S.C. 9604 and 9606. Pet. App. 21a-22a.

4. In December 1988, the district court granted the government's motion and dismissed petitioners' complaint for lack of jurisdiction under Section 113(h)(4) of CERCLA, 42 U.S.C. 9613(h)(4). Pet. App. 19a-31a. As an initial matter, the court held that, in light of the express provision in Section 113(h) of CERCLA, 42 U.S.C. 9613(h), neither the APA nor NEPA confers jurisdiction over petitioners' complaint since "[i]t is undisputed that the EPA action of which [petitioners] complain involves removal or remedial action pursuant to sections 104 and 106(a) of CERCLA, 42 U.S.C. §§ 9604, 9606(a)." Pet. App. 22a.

Turning to the government's contention that Section 113(h)(4) "precludes judicial review under the

citizen's suit provision until the remedial action selected by the EPA has been taken or secured," the court found that "the statute is not entirely clear about just when in the course of a remedial action a citizen's suit may be brought." Pet. App. 24a. The court therefore reviewed the legislative history, *id.* at 24a-30a, and determined that "the interpretations [there] precluding a citizen's suit challenging EPA action until at least the first phase of the remedy has been implemented are far more consistent with the official committee reports accompanying SARA," *id.* at 30a. The court thus concluded that Section 113(h) "permits citizens' suits challenging EPA actions only once a remedial action or discrete phase of a remedial action has been completed," Pet. App. 30a, and held that the statute "clearly provides that federal courts do not have subject matter jurisdiction for preenforcement reviews of EPA removal actions pursuant to section 9604," *ibid.* (quoting *Dickerson* v. *Administrator, EPA*, 834 F.2d 974, 977 (11th Cir. 1987)).

5. The court of appeals affirmed. Pet. App. 3a-17a. The court reviewed the pertinent language of Section 113(h)(4), concluding that "[t]he obvious meaning of this statute is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy." Pet. App. 11a (citing *Alabama* v. *EPA*, 871 F.2d 1548, 1557 (11th Cir. 1989)). And the court read the final sentence in Section 113(h)(4), *i.e.*, "[s]uch an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site," as further support for its "understanding of the statute's plain meaning." Pet. App. 11a. Here, the court pointed out, "[a]n incinerator has been chosen as the method to dispose of hazardous wastes in the Bloom-

ington area, but the remedial action outlined in the consent decree has not yet been undertaken." *Ibid.* In Section 113(h)(4), the court concluded, "Congress intended * * * to prevent unnecessary delay in implementing hazardous waste cleanups. That type of delay would surely result if [petitioners] were successful in requiring EPA to conduct Environmental Impact Statements and further Feasibility Studies." Pet. App. 11a-12a. Accordingly, the court held that Section 113(h)(4), by its terms, "precludes federal court review at this stage—when a remedial plan has been chosen, but not 'taken' or 'secured.'" Pet. App. 12a.[9]

ARGUMENT

1. Petitioners principally contend (Pet. 14-19) that Section 113(h)(4) does not preclude judicial review here because they "are in the posture of bringing a *post*-enforcement review claim, not a *pre*-enforcement review action." Pet. 14. The plain

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[9] Having concluded that "the plain language of the statute is clear," the court of appeals had no occasion to "engage in the lengthy examination of legislative history." Pet. App. 12a. The court observed, however, that "[t]he legislative history supports the conclusion that federal courts are deprived of subject matter jurisdiction where remedial action has not been completed." *Ibid.*

Petitioners also claimed that Section 113(h) should not be applied retroactively to their complaint, Pet. C.A. Br. 8-32, and that their complaint was not a challenge implicating Section 113(h), Pet. C.A. Br. 33-42. The court of appeals rejected those claims, Pet. App. 13a-16a, and petitioners have not sought further review of them. To the extent petitioners asserted that jurisdiction was available under the APA and that the dismissal for lack of jurisdiction amounted to a constitutional violation, the court of appeals rejected those claims as well. *Id.* at 16a-17a.

terms of the statute belie that contention, since the statute does not trigger judicial review based on "enforcement." To the contrary, the statute provides review only for "removal or remedial action *taken* under [Section 104] or *secured* under [Section 106]," Section 113(h)(4) of CERCLA, 42 U.S.C. 9613 (h)(4), not for actions "enforced" under those provisions. In other words, the statute provides review of challenges only to remedial actions already taken, not to planned remedial actions that have yet to be implemented. Indeed, the statute's use of the past tense—"[a]n action * * * alleging that the removal or remedial action taken * * * or secured * * * was in violation"—to identify reviewable challenges underscores this point, particularly when contrasted with the statute's use of the future tense to proscribe challenges to removal actions "where a remedial action is to be undertaken." *Ibid.*

In an effort to avoid the straightforward terms of the statute, petitioners now contend (Pet. 15-16) that Section 113(h) bars jurisdiction to review only challenges to administrative orders issued under Section 106(a) of CERCLA, 42 U.S.C. 9606(a), but not to court orders or consent decrees resulting from challenges brought under that statutory provision. That distinction is irrelevant here, since petitioners are challenging remedial action selected under Section 104 of CERCLA, 42 U.S.C. 9604—remedial action that falls within the express bar of Section 113(h), namely, "[n]o Federal court shall have jurisdiction * * * to review any challenges to * * * remedial action selected under section 9604." 42 U.S.C. 9613(h).

2. Contrary to petitioners' sweeping assertions (Pet. 19-22), the court of appeals' decision is fully consistent with other decisions construing the judicial

review provisions in Section 113(h). The courts of appeals have uniformly held that Section 113(h) precludes review of pre-implementation challenges to Section 104 and Section 106 actions.[10] See, *e.g.*, *Voluntary Purchasing Groups, Inc.* v. *Reilly*, 889 F.2d 1380, 1386-1390 (5th Cir. 1989); *Dickerson* v. *Administrator, EPA*, 834 F.2d 974, 977-978 (11th Cir. 1987); see also *Wagner Seed Co.* v. *Daggett*, 800 F.2d 310, 314-315 (2d Cir. 1986); *United States* v. *Outboard Marine Corp.*, 789 F.2d 497, 505-506 (7th Cir.), cert. denied, 479 U.S. 961 (1986); *Lone Pine Steering Comm.* v. *EPA*, 777 F.2d 882, 887-888 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986); but see *Cabot Corp.* v. *EPA*, 677 F. Supp. 823 (E.D. Pa. 1988) (suggesting in dicta that Section 113(h)(4) does not preclude review of an individual's pre-implementation challenge to a remedial plan).[11]

Petitioners' contention (Pet. 19-21) that the decision below conflicts with *Alabama* v. *EPA*, 871 F.2d 1548 (11th Cir.), cert. denied, 110 S. Ct. 538 (1989), is wide of the mark. In that case, the Eleventh Circuit held that Section 113(h)(4) barred judicial review of plaintiffs' challenge to the remedial plan arising under CERLCA. 871 F.2d at 1557-1559. Indeed, the court made plain that "because

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[10] To be sure, courts have spoken in terms of "pre-enforcement review." That terminology, however, reflects only the fact that most challenges to remedial actions have been brought by "potentially responsible parties" before the filing of enforcement actions against them. See, *e.g.*, *J.V. Peters & Co.* v. *EPA*, 767 F.2d 263 (6th Cir. 1985); *Lone Pine Steering Comm.* v. *Administrator, EPA*, 777 F.2d 882 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986).

[11] Petitioners, although citing the *Cabot* decision in passing (Pet. 28), correctly recognize that its statement in dicta does not give rise to a conflict warranting further review.

plaintiffs challenge the implementation of the remedial action plan selected, not the selection of an offsite remedial action plan in general," it "lack[ed] jurisdiction over this challenge to the implementation of the remedial plan under section 113(h)." 871 F.2d at 1558.[12] Here, as the court of appeals correctly recognized, see Pet. App. 15a-16a, petitioners have pursued a similar challenge. For that reason, the decision below is fully consistent with the *Alabama* case.[13]

3. Finally, petitioners contend (Pet. 29-34) that, despite the limitation of Section 113(h)(4), the courts below erred in failing to invoke *Leedom* v. *Kyne*, 358 U.S. 184 (1958), to exercise jurisdiction over their challenge to the remedial action. As this Court has made plain, the *Leedom* v. *Kyne* doctrine has "narrow limits," *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964), and may apply only where the agency—at a minimum—plainly acts "in excess of its delegated powers and contrary to a *specific prohibition in the Act.*" *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract*

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[12] To be sure, in *Alabama* v. *EPA*, the court of appeals briefly addressed and rejected plaintiffs' claims "[t]o the extent plaintiffs' complaint may in part be read as not challenging the remedial action plan and therefore not removed from federal jurisdiction by section 113(h)." 871 F.2d at 1559. But that alternative ground of decision does not conflict with the decision below, since the court of appeals here expressly determined that petitioners' complaint raised only such an impermissible challenge under CERCLA. See Pet. App. 15a-16a.

[13] Nor does the decision below conflict with *Browning-Ferris Indus.* v. *Muszynski*, 899 F.2d 151 (2d Cir. 1990). See Pet. 19, 21-22. There, the court of appeals "assume[d] jurisdiction *arguendo* without deciding the issue [whether Section 113(h) precluded judicial review]." 899 F.2d at 159.

Employees (*Railway Clerks*), 380 U.S. 650, 660 (1965); *Leedom* v. *Kyne*, 358 U.S. at 188.

Here, the court of appeals, after reviewing the process by which the government and other parties to the *Westinghouse* action developed and sought to implement the remedial plan, found no evidence that the government "failed to obey mandatory statutory requirements." Pet. 29. In other words, the record here does not suggest—let alone establish—that the EPA has acted "contrary to a *specific prohibition* [in the governing statutes]." *Railway Clerks*, 380 U.S. at 660. And invocation of jurisdiction under *Leedom* v. *Kyne* would be particularly inappropriate where, as here, judicial review is postponed—rather than foreclosed—by virtue of Section 113(h). Indeed, petitioners here will have ample opportunity to raise their challenges before the courts. The *Westinghouse* consent decree requires at least nine permits and approvals before the incinerator may be constructed; these proceedings call for public comment and will be subject to judicial review. See Pet. App. 14a n.5.[14]

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[14] For similar reasons, petitioners' efforts (Pet. 25-28) to elevate their statutory contentions to constitutional claims warrant no further review. See Pet. App. 17a; cf. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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